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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 SAUL HOROWITZ,

4 Plaintiff,

5 v.

17-cv-7742 (JPO)

6 NATIONAL GAS & ELECTRIC, LLC, et al.,

7 Defendants.

Trial

8 -----x
9 New York, N.Y.
10 March 5, 2020
11 9:15 a.m.

12 Before:

13 HON. J. PAUL OETKEN

14 District Judge

15 APPEARANCES

16 KING & SPALDING LLP

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(Trial resumed)

THE COURT: Good morning, everyone. Any preliminary matters?

MR. DAHAN: Yes, your Honor. So, since yesterday there has been a little shift in the witness order; we're also trying to streamline for the Court.

So, the first witness plaintiff intended to call was Keith Maxwell. We have decided to just allow his witness name to be adopted, and we're going to waive any cross; it will just be admitted in, and we can move from that witness.

We were then going to start with Todd Gibson, who had some flight issues, so he will be able to be here in the afternoon, so...

THE COURT: So, we will take the morning off?

MR. DAHAN: And we will start with Elliott Wolbrom, then Mark Josefovich, and then Amir Benisti and then Todd Gibson.

And then just a reminder for tomorrow the plan is to have Dan Alper, the former CEO of Major Energy, followed by James Chung, former employee of PSE. We believe that -- if your Honor recalls, we asked if we could finish by 3 o'clock Friday, given some observances.

THE COURT: Yes.

MR. DAHAN: We think that will take us -- it's hard to predict, but it's going to be hard for them to show up with a

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1 another witness, so we might a little off, we might finish a
2 little before three. I just hope the Court can understand.

3 THE COURT: OK.

4 MR. DAHAN: And we will again over the weekend try to
5 figure out for next week, and we will try to get this done by
6 Wednesday, Thursday the latest.

7 THE COURT: OK. So is Mr. Maxwell here?

8 MR. DAHAN: No.

9 MR. BROWN: What we discussed was because we submitted
10 a sworn statement and there will be no further testimony
11 elicited, the sworn statement will go in and there's no further
12 need to swear the witness.

13 THE COURT: That's fine. OK.

14 MS. COREY: Plaintiff would like to call Elliott
15 Wolbrom.

16 THE COURT: All right. Mr. Wolbrom.

17 ELIOTT WOLBROM,

18 called as a witness by the plaintiff,

19 having been duly sworn, testified as follows:

20 THE COURT: How do you want to do the witness
21 statement? Do you want to start?

22 MS. COREY: Sure.

23 DIRECT EXAMINATION

24 BY MS. COREY:

25 Q. Mr. Wolbrom, do you adopt your witness statement?

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1 Actually, do you have your witness statement in front of you?

2 A. Yes.

3 Q. Do you recognize that as your witness statement that you
4 signed under oath?

5 A. Yes.

6 Q. Do you adopt this witness statement today?

7 A. Yes.

8 MS. COREY: We will offer that into evidence, and then
9 I think we have a list of exhibits that we will give you at the
10 end that are cited in the witness statement.

11 MR. BROWN: Mr. Wilkerson will be handling
12 Mr. Wolbrom's cross-examination.

13 THE COURT: OK. Mr. Wilkerson.

14 MR. WILKERSON: Your Honor, we have already
15 distributed defendant's objections to Elliott Wolbrom's witness
16 statement, as well as the cross binder for Mr. Wolbrom.

17 THE COURT: Thank you.

18 CROSS EXAMINATION

19 BY MR. WILKERSON:

20 Q. Good morning, Mr. Wolbrom. How are you?

21 A. Wonderful.

22 Q. Let's start with your background. You joined Major Energy
23 in 2012?

24 A. Yes.

25 Q. As the director of marketing, right?

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1 A. Yes.

2 Q. And in 2015 you asked Mr. Wiederman if he would change your
3 title to chief marketing officer; is that right?

4 A. Yes.

5 Q. And you thought that title was stronger in the marketplace,
6 right?

7 A. Well, through the course of my work I interacted with a lot
8 of chief marketing officers via certain partnerships we had,
9 and sitting around the conference table with other chief
10 marketing officers, I thought Major Energy would be better
11 represented if the title was changed. The job didn't change,
12 but it's more just the title.

13 Q. You thought that title would be stronger in the
14 marketplace, right?

15 A. I thought it would be on par with everybody else at the
16 table I was at.

17 Q. You are aware as part of the sale of Major Energy to NGE,
18 that certain executives at Major Energy received additional
19 potential compensation through an executive earnout agreement,
20 right?

21 A. I wasn't aware of anybody else's compensation.

22 Q. Have you ever heard of the executive earnout agreement?

23 A. I heard the term. I don't know any of the details or who
24 was included in it.

25 Q. OK. You know you were not included in that agreement,

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1 right?

2 A. Correct.

3 Q. And you are aware that some of the other managers at Major
4 Energy received employment contracts with severance rights that
5 could be triggered upon a change of control.

6 A. I don't know anything about the employment agreements of
7 anybody else other than myself.

8 Q. OK. You got a new employment agreement from Spark in 2016?

9 A. I believe so, yes.

10 Q. And in connection with that employment agreement you
11 received a signing bonus of \$60,000, right?

12 A. Yes.

13 Q. Is it fair to say that was the only additional compensation
14 you received as a result of the sale of Major Energy?

15 A. I don't believe that \$60,000 was a result of the sale. The
16 \$60,000 was a bonus for me signing an agreement with Spark that
17 came with certain restrictions regarding noncompetes, etcetera,
18 etcetera. It had nothing to do with what Major Energy had
19 done.

20 Q. It had to do with the sale of Major Energy to NGE and then
21 Spark, right?

22 A. No, that was an employment agreement between Spark and
23 myself, for me to continue working there under a new set of
24 policies or procedures, whatever.

25 Q. And had the dropdown had not occurred, you would not have

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1 signed the agreement with Spark, true?

2 A. Pardon me?

3 Q. You know what the dropdown is, right, sir?

4 A. Yes.

5 Q. Had the dropdown not occurred, you would not have signed an
6 agreement with Spark, true?

7 A. I don't know what would have happened.

8 Q. OK. So it's possible that maybe you would have gone to
9 work for Spark even if Major Energy had not been sold.

10 A. My intention was to stay with Major Energy indefinitely.

11 Q. Let's talk about your personal knowledge for a second. You
12 left Major Energy in what month of 2016?

13 A. I believe it was October of 2016.

14 Q. OK. And you went to a totally different industry, right?

15 A. Correct.

16 Q. So you had no personal knowledge about Major Energy's
17 operations, or activities or performance after October 2016,
18 right?

19 A. Correct.

20 Q. You don't know, for example, if Major Energy's customer
21 acquisition costs increased or decreased after you left?

22 A. After I left, I left. I don't know anything that happened
23 after that.

24 Q. OK. You did stay in contact with Mr. Sobel after you left,
25 right?

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1 A. Sure.

2 Q. You used WhatsApp to chat with Mr. Sobel on occasion?

3 A. I used WhatsApp to chat with a lot of people.

4 Q. Including Mr. Sobel.

5 A. Yes.

6 Q. You mention in your witness statement a press release from
7 May 4, 2016. Do you remember that press release?

8 A. I'd like to refer to it, but I do remember a press release.

9 Q. Sure, we will bring it up on the screen so it will be
10 easily accessible for you.

11 Let's pull up PX253, James.

12 Is this the press release that you issued on May 4,
13 2016?

14 A. Would it be possible to see the whole document at once?
15 Because there were a number of drafts, and I want to make sure
16 I can distinguish between a draft and what did go out.

17 Q. Yes.

18 A. OK, I reviewed it.

19 Q. This is the press release you released on May 4, 2016,
20 right?

21 A. This looks like a press release that was -- yeah, that was
22 either on our website perhaps, or maybe this was the official
23 one that went out, yeah.

24 Q. Can you click to the next page, James.

25 A. What was the date on the other one?

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1 Q. There is one document with two pages.

2 A. Sorry. Thank you.

3 Q. All May 4, 2016. And you see there at the top there is a
4 continuation of the prior page, it says Major Energy, Elliott
5 Wolbrom, chief marketing officer, right?

6 A. Yes.

7 Q. Let's go back to the first page. and let's focus on the
8 last paragraph before the bold "About National".

9 So in this press release Mr. Alper says, "We see the
10 acquisition by Spark Energy and their financial integration as
11 a win-win for our customers, employees, vendors and marketing
12 partners. While we continue to run our business as usual, the
13 financial integration with Spark brings us additional
14 opportunities to bring enhanced value to the customer
15 marketplace as part of a much larger platform."

16 Did I read that correctly?

17 A. Yes.

18 Q. Now, this press release was approved by Dan Alper -- who
19 was the CEO of Major Energy -- before it went out, right?

20 A. Presumably, yes.

21 Q. And it was approved by the president Mr. Wiederman, right?

22 A. I don't know if it was both of them or one or the other. I
23 don't remember who approved it, but someone approved it. One
24 or both of them approved it.

25 Q. I'm sorry?

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1 A. I said one or both of them approved it. I don't recall
2 which one it was.

3 Q. OK, let's look at DX302. DX302 is an e-mail from you to
4 Mr. Wiederman, Mr. Alper and Mr. Horowitz. The subject is
5 PR -- short for press release, right?

6 A. Yes.

7 Q. And you see this is on May 4, 2016, right?

8 A. Yes. I'm sorry.

9 Q. The same day you sent out this press release, true?

10 A. Yeah.

11 Q. And you say, "Please see updated PR attached, and upon your
12 approval I will get this in the market wired queue for a 5:30
13 p.m. release pending the final approval near the release time."

14 Do you see that?

15 A. Yes.

16 Q. Did you get the approval of Mr. Alper and Mr. Wiederman and
17 Mr. Horowitz to send out the press release?

18 A. I don't remember the specific e-mail. If you have one, I
19 can perhaps verify it. But it stands to reason I wouldn't send
20 out a press release of this nature without supervisor approval.

21 Q. That's not something you ever did, is it?

22 A. I have absolutely sent out press releases throughout the
23 course of my work, but something like this regarding a sale,
24 dropdown, whatever this was about, that would have been
25 approved by a superior of mine.

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1 Q. And let me ask a more specific question. I apologize for
2 not being clear.

3 You would not have sent out a press release after
4 asking approval of your superiors until you got their approval,
5 right?

6 A. Most likely, yes.

7 Q. Staying on the topic of Mr. Alper for a second, you
8 mentioned in your witness statement at paragraph 82 that in
9 your view Spark and Mr. Alper were one in the same. Do you
10 recall that?

11 A. Can I --

12 Q. Sure, you've got it there. Just open it up, go to
13 paragraph 82 and refresh the recollection of your testimony.

14 A. Thank you.

15 Yes. Did you ask me?

16 Q. I'll ask it again.

17 A. Thank you.

18 Q. So in your witness statement at paragraph 82 you say that
19 in your view Spark and Mr. Alper were essentially one in the
20 same, right?

21 A. After the sale and dropdown, that was my perception over
22 time.

23 Q. That would have been after August 2016, right?

24 A. Whatever the date was.

25 Q. Mr. Alper was hired by Mr. Horowitz and the other sellers

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1 before the sale to NGE, right?

2 A. I don't know anything about who hired him or the date. I
3 wasn't involved.

4 Q. You were an employee at Major Energy in 2015, right?

5 A. Yes.

6 Q. And you remember that Dan Alper became CEO of Major Energy
7 in 2015?

8 A. Yes.

9 Q. And you remember that Major Energy was not sold to NGE
10 until 2016, right?

11 A. Yes.

12 Q. Do you have any -- do you have any evidence that Spark was
13 involved in the hiring of Mr. Alper at Major Energy?

14 A. I don't have evidence regarding the hiring of anybody
15 unless I hired them. I wasn't involved in that; I don't know.

16 Q. As far as you know, Spark had nothing to do with the
17 decision of Major Energy to hire Dan Alper as CEO, right?

18 A. One more time.

19 Q. As far as you know, Spark had nothing to do with the hiring
20 of Dan Alper --

21 A. I don't know. I don't know who was involved.

22 Q. Let me just get the question out. As far as you know,
23 Spark Energy had nothing to do with the hiring of Mr. Alper at
24 Major Energy as CEO.

25 A. I don't know anything about who hired, or why he was hired

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1 or who brought him. I just don't know.

2 Q. Let's switch topics and talk about corporate sponsorships
3 for a minute. You remember in your witness statement talking
4 about corporate sponsorships, right?

5 A. Yes.

6 Q. And those corporate sponsorships were with the Yankees,
7 Madison Square Garden, the Knicks, the Rangers, maybe some
8 others I'm missing, right?

9 A. Yeah, there are a bunch.

10 Q. And the purpose of those sponsorships was not merely for
11 you and the other Major Energy employees to enjoy games and
12 concerts, right?

13 A. The purpose of those sponsorships were to drive revenue and
14 grow Major Energy and the Major Energy brand.

15 Q. So they were meant to publicize the Major Energy brand,
16 right?

17 A. They were meant to a number of things; it wasn't specific
18 things. It was meant to ultimately grow the revenue and value
19 of Major Energy.

20 Q. And to build relationships with vendors and with brokers as
21 well, correct?

22 A. Yes.

23 Q. And when did those sponsorships begin?

24 A. Which ones are you referring to?

25 Q. Let's go with the first significant one that you can

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1 remember.

2 A. We started discussions with Madison -- I started
3 discussions with Madison Square Garden I believe February 15,
4 2013, and I believe we -- and I believe it was August of 2013
5 that we signed our marketing partnership with them.

6 Q. So fair to say that the sponsorships commenced years before
7 the sale of Major Energy to NGE, right?

8 A. I believe that the deal with the Knicks and Madison Square
9 Garden was some point in August 2013, which would be before the
10 sale.

11 THE COURT: Can you just clarify for me, when you say
12 marketing partnership, was that providing energy to those
13 entities, or was that just doing some marketing together?

14 THE WITNESS: So that particular deal in that year did
15 not have a supply deal; we weren't supplying Madison Square
16 Garden; they were already with someone; but it included IP
17 rights, the ability to use their logos. We had advertisements
18 on TV, we had hospitality at the games and a slew of stuff on
19 digital, Internet, social media. It was a multi-faceted deal;
20 it touched a lot of different parts of our business.

21 THE COURT: Thank you.

22 Q. So notwithstanding the sponsorships starting in 2013, Major
23 Energy's' customer count decreased from 2013 to 2014. Are you
24 aware of that?

25 A. I don't have the numbers in front of me.

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1 Q. Could we pull up DX213, let's just skip to slide 19 first.

2 Do you see, Mr. Wolbrom, in this presentation that
3 the customers on the electric side decreased from 2013 to 2015?

4 A. In 2013 to 2015 it looks like it went up.

5 Q. If you look at the bottom there is a legend. Black is
6 customers and light gray is RCE. Do you see that?

7 A. I see RCEs went up from 2013 to 2015.

8 Q. And the question is do you see customers decreased from
9 2013 to 2014 and then again from 2014 to 2015?

10 A. It's hard to distinguish between 2014 and 2015, but it
11 looks like a very small -- I'm sorry -- yeah, I mean -- now I
12 don't have the numbers on the left. But from 2014 to 2015 it
13 looks like the customer count went down, and it looks like the
14 RCE total went up, which would show our commercial business was
15 improving. I'm sorry, the screens are moving; give me one
16 second. It looks like a very, very small dip from 2013 to
17 2015.

18 I am not familiar with this document -- I don't know
19 where this is from -- I didn't make this. But just reading a
20 typical graph, it looks like RCE count went up from 2013 to
21 2015, which would show that Madison Square Garden partnership
22 was doing its thing, as well as our other partnerships, and
23 perhaps customer count -- which obviously is less important --
24 it's all about the RCEs -- maybe dipped very, very slightly.

25 Q. You're aware, Mr. Wolbrom, that the earnout about which

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1 we're all here in court is based in part on customer count,
2 right?

3 A. I don't know anything about the earnout or the details
4 involving it.

5 Q. Can you skip to page 1, James. Let's orient Mr. Wolbrom
6 with this document a little more. Sorry, all the way to page 1
7 of the pdf.

8 Do you know who Cliff Adams is, Mr. Wolbrom?

9 A. Who?

10 Q. Cliff Adams?

11 A. No.

12 Q. Did you ever meet Dave Hennekes or Paul Konikowski?

13 A. The name Cliff Adams is a familiar name; I don't know who
14 it is. Dave and Paul I believe I met and obviously spoke to in
15 a very limited capacity though. I'm familiar with the names.

16 Q. You would have met them from NGE during the due diligence
17 period when NGE was considering purchasing Major Energy, right?

18 A. I don't know when it was -- or I don't know what was going
19 on. I'm familiar with the names. I may have exchanged
20 e-mails. I don't know at what point during this big
21 transaction I met them, but I am familiar with those names.

22 Q. And Dan Alper obviously you know.

23 A. Yes.

24 Q. Did you ever assist Mr. Alper or anybody else at Major
25 Energy with the creation of these management presentations that

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1 were to be made to NGE?

2 A. Which management presentation?

3 Q. Well, you can skip down to the next page, James.

4 Does this look familiar to you, sir?

5 A. No.

6 Q. Do you recall providing marketing information to Mr. Alper
7 or anybody else at Major Energy in late 2015 or early 2016 for
8 the purpose of creating management presentations?

9 A. I did a lot of reporting from pretty much the time I got
10 there to when I left. What people did with that information
11 once I left -- well, I should say once a superior of mine --
12 what they did with that information -- unless they specifically
13 told me -- I wouldn't know. I'm not aware of this management
14 presentation document. It's possible that somebody asked me
15 for a specific about a vendor, or a partner, and I would have
16 answered, not without knowing where it was going, but gave it
17 to my boss.

18 THE COURT: Did you say a lot of reporting or a lot of
19 recording?

20 THE WITNESS: No, reporting.

21 THE COURT: Reporting.

22 THE WITNESS: Yes, sorry.

23 Q. Is there any reason that you have to think that this
24 management presentation sent to Mr. Alper, Mr. Hennekes and Mr.
25 Konikowski would be incorrect?

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1 A. I don't know anything about it. I would imagine if
2 somebody from Major Energy sent a document that it's a correct
3 document, but I don't recall formulating this or specifically
4 providing information. It's possible; I just don't remember.

5 Q. The information that you sent to management whenever they
6 requested it, it was accurate, right?

7 A. To the best of my ability, yes.

8 Q. Let's skip to page 21, slide 21, James.

9 Do you see here, sir, in 2013 ending customers for
10 2013 is over 178,000 customers?

11 A. 2013? The highlighted?

12 Q. Yes.

13 A. I see a number there, yes.

14 Q. And it drops to 168 in 2014, right?

15 A. Yes.

16 Q. And then customer count drops to 151 in 2015, correct?

17 A. That's what it says here.

18 Q. Talking a little bit more about these corporate marketing
19 sponsorships, other ESCOs also have similar sponsorships,
20 right?

21 A. Similar to what?

22 Q. Similar to Major Energy?

23 A. Which sponsorships are you referring to?

24 Q. You mention in your witness statement that Major Energy was
25 one of the first players in this area to actually start

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1 sponsorships with big entities, right?

2 A. Big entities?

3 Q. Yeah, like Madison Square Garden, the Knicks.

4 A. This is what you're trying to ask. To my knowledge I was
5 unaware of any major -- no pun intended -- major partnership or
6 sponsorship deal between an ESCO and a sports team. I was
7 unaware. Perhaps a utility and a sports team. But an ESCO and
8 a sports team I was unaware. Whether or not another energy
9 company had a big partnership with someone else, that I don't
10 know. I would hope so, but...

11 Q. Well, you are aware that other energy companies have
12 sponsorship deals with -- I mean in the marketplace, right?

13 A. No, I don't know what you're referring to.

14 Q. OK. So in your witness statement you don't recall
15 mentioning that other ESCOs tried to follow Major's lead in
16 this card regard?

17 A. In regards to an ESCO doing a sponsorship deal with a
18 sports team, I was unaware at the time in 2013 of anyone ever
19 having done that. After we did the deal, other ESCOs followed
20 suit.

21 Q. That's all I'm trying to do. It took me a long time to get
22 there. I apologize.

23 A. No, I just want to answer accurately.

24 Q. OK. So other ESCOs sort of followed Major into this
25 sponsorship space; is that fair?

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1 A. It certainly appeared that way to me, yes.

2 Q. OK. In your written witness statement, you don't attempt
3 to calculate the return on investment of the corporate
4 sponsorships, right?

5 A. I don't believe I put figures vis-a-vis a specific deal in
6 my testimony.

7 Q. Or the conglomeration of all of the deals, right?

8 A. I don't think there are any figures in my testimony.

9 Q. As far as you know, after you left Major Energy, Major
10 employees continued using the sponsorships throughout the
11 earnout period to entertain brokers and vendors, right?

12 A. I don't know what Major Energy did after I left. I left
13 the industry and I went to a totally different industry, and
14 don't know what they did.

15 Q. Let's talk about vendors and churn.

16 THE COURT: C-h-u-r-n, churn?

17 MR. WILKERSON: Like churning butter, yes.

18 Q. Do you recall in the second half of 2015 that Major Energy
19 decreased its customer acquisition costs?

20 A. Decreased what?

21 Q. You know what customer acquisition cost is, right?

22 A. I sure do, yes.

23 Q. And sometimes people refer to that as CAC?

24 A. Yeah.

25 Q. Do you remember in the second half of 2015 Major Energy cut

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1 its CAC?

2 A. We had various -- overall -- I wouldn't be aware of an
3 overall number. We had a number of verticals with which we
4 brought in RCEs, so I wouldn't be aware of all of them and what
5 the general costs per acquisition would be, so I can't point to
6 a specific number to say yes. Certain vendors our costs went
7 down, and I'm sure certain vendors our costs went up.

8 Q. OK. I'm talking about the CAC spend for Major Energy as a
9 whole, not on a particular vendor.

10 A. As a whole I wouldn't know. If we spent X amount of
11 dollars to bring in certain commercial business which I wasn't
12 involved in, and that number either went up, the CAC either
13 went up or down, I would not know.

14 Q. James, can we turn to DX213 again. Let's go to slide 29.

15 You see this is titled "Door-to-door sales, resumed
16 significant campaign from January 2016." Right?

17 A. Yes.

18 Q. And if you go down to the chart you can see that in May
19 2015 there is a drop in customer acquisition spend, right, as
20 compared to April 2015?

21 A. This doesn't look like spend; this looks like accounts.

22 Q. Oh, you're right, you're right. So let me back up.

23 This customer account chart demonstrates that in May
24 of 2015 the customer count of Major Energy decreased relative
25 to April 2015, right?

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1 A. I don't know that this is customer count. It looks like
2 the amount of -- I don't know what this is. This doesn't look
3 like total customer count. I believe Major Energy had more
4 than 14,000 customers at any point on this graph.

5 Q. Correct. It says door-to-door sales, right, at the top?

6 A. Yeah.

7 Q. OK. So is it your understanding that this chart
8 demonstrates that Major Energy's door-to-door sales decreased
9 month to month from April to May of 2015?

10 A. Yes, door-to-door sales in a given month.

11 Q. And door-to-door sales were the main channel for Major
12 Energy to acquire residential customers, true?

13 A. Yes.

14 Q. And do you see that this decrease continues from May to
15 June --

16 A. I should say up until I left. I don't know how Major
17 Energy acquired residential customers after I left. While I
18 was there, door-to-door would be the number one sales channel.

19 Q. Right. And I am not going to try to hold you to anything
20 after you left, but thank you for that clarification.

21 Do you see the door-to-door sales decrease again from
22 May to June of 2015, right?

23 A. Yes.

24 Q. And then they stay relatively low relative to the prior
25 periods from May 15 until December 15, right?

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1 A. Well, I see from July to August it goes up, from August to
2 September it tails a little, September to October it shoots
3 back up -- goes back up. November goes down a bit. December
4 it goes down, and in January it shoots up significantly, almost
5 doubles.

6 Q. Correct. So this period from May 2015 to December 2015,
7 every single one of those months is lower than every month
8 between January '14 and April '15, according to this chart,
9 right?

10 A. Yeah. Just ask you to repeat the question one more time.

11 Q. Sure. This period of May '15 to December '15, every one of
12 those months is lower in door-to-door sales than the months of
13 January '14 to April '15, right?

14 A. No, that's incorrect. Well, the first subset is to
15 December '15? Or are you going into January already? Not
16 going into January. Well, January it shoots back up. If you
17 wants to just stop at December, then it would appear that, yes
18 -- it would appear that from May until December of '15 the
19 sales were lower than from January until April of '15, correct.
20 Yeah.

21 Q. And, as you recall, we looked at slide 19 and slide 21 of
22 this same presentation and saw that customer count hit its peak
23 at Major Energy in 2013. Do you recall that?

24 A. I would need to see it one more time.

25 Q. Can we go to slide 21.

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1 Do you see the customer count peaks at 178 in 2013?

2 A. The ending customer count is higher in 2013 than in the two
3 years prior or after.

4 Q. And as you mentioned, customer acquisition through
5 door-to-door sales started to bounce back up in January of
6 2016, right?

7 A. If we can go back to it, yeah. January 2016, I recall from
8 that slide, yeah.

9 Q. Let's go back to slide 29.

10 A. It went up.

11 Q. Do you see it bounces back up in January 2016?

12 A. I do.

13 Q. And you as chief marketing officer, you were aware of the
14 marketing activities at Major Energy at this time period,
15 right?

16 A. Yes.

17 Q. And you were aware that in January of 2016 Major Energy
18 started to spend quite a bit more with its door-to-door
19 vendors, right?

20 A. More?

21 Q. More money?

22 A. I don't know what Major spent totally; that wasn't my lane,
23 so to speak.

24 Q. Sorry, keep going.

25 A. No, I don't know what Major's total spend in January '16

K357HOR1

Wolbrom - cross

1 versus December '15 were. I do see that we brought in nearly
2 8,000 accounts in January. And in December -- which, you know,
3 I mean there are reasons for 2015, and we haven't gone there --
4 but, yeah, January '16 we spent -- we more than doubled the
5 prior month.

6 Q. And you recall that in January of 2016 the vendors for
7 Major Energy were ramping up their activity on Major Energy's
8 behalf, right?

9 A. It would appear so. There were other things going on. It
10 wouldn't just be that a vendor was ramping up, but a lot of
11 this is seasonal; it's very hot in the summer and very cold in
12 December. It's possible we signed up a new vendor or a vendor
13 got a new team or grew. There could be just a number of
14 reasons why it shot up in January '16.

15 Q. Door-to-door vendors are paid per sale, right?

16 A. From my recollection, every vendor had their own deal; it
17 wasn't as simple as being paid for sale.

18 Q. Some of them were a little more complicated with a residual
19 as well?

20 A. I wouldn't say complicated, it's just different.

21 Q. Is it fair to say some vendors would simply receive an
22 upfront payment --

23 A. Yes, vendors would be paid per sale, some vendors would be
24 paid per time spent, some vendors would be paid in a hybrid
25 model of residual and upfront. I don't believe any two were

K357HOR1

Wolbrom - cross

1 exactly the same. That's the nature of the business.

2 Q. PTM in particular, you discuss PTM quite a bit in your
3 written statement, right?

4 A. Yes.

5 Q. PTM in particular had a hybrid, I think is the word you
6 used, where they got an upfront payment for every customer they
7 brought in, right?

8 A. I believe we had at least two different agreements with
9 PTM, to my knowledge. I am happy to look at documents and
10 refer to them.

11 I believe the first one was just paid per meter, and
12 it had certain restrictions. Usage was tied to it; we paid on
13 a usage tier, if I recall. And subsequent deals with PTM --
14 and again I'm speculating; I would like to see it in front of
15 me -- it would be likely we combined a residual model, thus
16 creating a hybrid.

17 Q. By residual model you mean an upfront payment, and then as
18 the customer remains on flow with Major Energy and creates
19 revenues for Major Energy, Major Energy gives a residual
20 payment?

21 A. PTM would bring us the customer. After a designated period
22 of time, we would then pay PTM, provided they were still with
23 us, and then after a certain period of time a residual would
24 kick in for PTM as long as they stayed with us. And that was
25 based on usage.

K357HOR1

Wolbrom - cross

1 Q. James, let's go to DX213 at slide 27, please.

2 This is the same document, Mr. Wolbrom. Do you see
3 this slide is called "capitalized customer acquisition and
4 providers"?

5 A. Yes.

6 Q. And if you look at PTM, it's one of the highlighted rows,
7 it was making \$90.5 for customer acquired, right?

8 A. I am not familiar with this document. I never saw it
9 before, and I didn't make it.

10 Q. Do you have any reason to think that was inaccurate back in
11 January of '16?

12 A. No. If Major Energy provided it, then I don't believe it's
13 inaccurate. I'm just not familiar with it.

14 Q. And that's higher than every other vendor on this sheet
15 other than DSS, right?

16 A. Well, DSS and PTM would seemingly be our two largest
17 vendors, and PTM would be not the highest customer. I mean
18 90.5 is less than 91.4.

19 Q. Right. So the answer to my question is, yes, PTM is --

20 A. -- would seem to be the second highest.

21 THE COURT: Before you answer, please let him finish
22 the question.

23 Q. The dollars per customer acquire is higher for PTM than any
24 other vendor except DSS, true?

25 A. Yes.

K357HOR1

Wolbrom - cross

1 Q. Now, if you scroll to the bottom of this slide, please,
2 James, let's look at the notes.

3 Do you see that first note there, "Door-to-door
4 customer acquisition costs have increased over the past several
5 months, with current charges ranging from \$100 to \$125."

6 Do you see that?

7 A. Yes.

8 Q. Major was capable of paying market prices for its customer
9 acquisitions, right?

10 A. I believe Major paid below market price for their
11 customers -- through PTM specifically.

12 Q. Major was capable of paying market prices for customer
13 acquisitions, right?

14 A. Yes.

15 Q. And when you resigned from Major Energy, do you recall how
16 many hundreds of thousands of dollars per month PTM was making
17 on average?

18 A. I don't know.

19 Q. PTM was still actively marketing for Major Energy when you
20 resigned, right?

21 A. I'm trying to recall. I believe we were still working with
22 them. It was not under the same quality of relationship, I'll
23 say, but I don't believe we terminated an agreement with them
24 while I was still there.

25 Q. Is it your recollection based on that answer you just gave

K357HOR1

Wolbrom - cross

1 that PTM was receiving less revenue from Major Energy as time
2 went on in 2016?

3 A. After I left?

4 Q. Throughout 2016. What was the trend of revenue from Major
5 to PTM?

6 A. I don't have -- I don't recall. I would need to see it and
7 possibly verify. But from my recollection in 2016 we were
8 growing as that last graph on that other slide showed. And I
9 believe we had a very strong January and February, the first
10 couple of months. I just don't have the numbers in front of
11 me. I don't know what happened after I left. The relationship
12 certainly deteriorated -- that I can tell you -- while I was
13 there.

14 Q. When you say relationship, what are you referring to?

15 A. Well, I had a very strong relationship with the owners and
16 a lot of the managers at PTM. After the sale and the dropdown
17 there was a narrative and a vibe of distrust between what I was
18 saying and what PTM was perhaps seeing. So, the moment
19 distrust becomes a variable in a relationship it starts to
20 unwind, I would say.

21 Q. Were you aware that PTM made more money from Major Energy
22 in 2016 than 2015?

23 A. No, I don't know what PTM made.

24 Q. And did you know that PTM remained the largest vendor for
25 Major Energy throughout the entire earnout period?

K357HOR1

Wolbrom - cross

1 A. It could be they were the largest, but it doesn't mean
2 their numbers didn't dwindle down and the others were even
3 smaller. I don't know. I am not aware of anything that
4 happened after I left.

5 Q. You knew Bruce Shipper, right?

6 A. Who?

7 Q. Bruce Shipper?

8 A. Yes.

9 Q. He ran the broker department at Major Energy?

10 A. Yes.

11 Q. In your witness statement you mention brokers a few times;
12 is that fair to say?

13 A. Yes.

14 Q. And you don't name any brokers who supposedly severed their
15 relationship with Major Energy in 2016, right?

16 A. I don't believe I named anybody in my testimony.

17 Q. Let's talk for a minute about Pennsylvania. Do you recall
18 in August of 2016 Major Energy entered into a settlement
19 agreement that was approved by the PUC?

20 A. I don't recall the dates, but I know there was a
21 settlement.

22 Q. And a settlement was actually with the PUC, right -- the
23 Public Utilities Commission of Pennsylvania?

24 A. I know there were a few different entities involved.

25 That's not my lane. I don't remember the name of the entity,

K357HOR1

Wolbrom - cross

1 but I know there was a settlement.

2 Q. But you kept up with the regulatory restrictions on Major
3 Energy's marketing activities, did you not?

4 A. I'm not aware of any restrictions on Major Energy's
5 marketing.

6 Q. Let's turn to -- let's first turn to DX1059 to see the
7 press release regarding the approval of the settlement.

8 Just to make sure we're on the same page, you see this
9 press release says "PUC Orders \$5.2 million in refunds and
10 penalties against Respond Power, accused of deceptive polar
11 vortex marketing and billing practices." Did I read that
12 correctly?

13 A. Yes.

14 Q. And this is August 11, 2016, right?

15 A. Yes.

16 Q. And it is your recollection as well that there was a
17 settlement approved in August of 2016 with the PUC, right?

18 A. That's what it would appear, yeah. I don't know the
19 details of the settlement offhand.

20 Q. All I'm asking is that you recall the settlement being
21 approved in August of 2016, right?

22 A. That sounds familiar.

23 Q. So, in addition to this \$5.2 million payment, this
24 settlement also required Major to implement certain business
25 and sales practices, right?

K357HOR1

Wolbrom - cross

1 A. I don't recall what those would have been or what they were
2 offhand.

3 Q. Do you recall being engaged in conversations at Major
4 Energy in order to implement certain business and sales
5 practices as a result of this settlement?

6 A. I don't recall -- I don't recall having -- in connection
7 with what happened in Pennsylvania, I don't remember
8 specifically marketing practices that we changed. We were
9 constantly changing our marketing strategies for a number of
10 different reasons. I cannot point to something specific,
11 unless you wanted to show me, that we changed because of this
12 settlement.

13 Q. Sure. It's not a memory test. I will show you the
14 documentation.

15 A. Thank you.

16 Q. Let me first show you DX359. That's Defendant's 359. You
17 see -- you are not on this e-mail. This is an e-mail from Adam
18 small to Dan Alper. And if you go to the bottom of the next
19 page -- sorry -- the bottom of the last page. Do you see the
20 "P.S."

21 A. I see the PS, but if it's OK with you, I would like to read
22 the whole e-mail so I have context. I have never seen this
23 before.

24 Q. The PS is the only thing I'm going to be asking you about,
25 but feel free to read the whole thing if you like.

K357HOR1

Wolbrom - cross

1 A. I will read it quickly.

2 THE COURT: If you would rather read the paper
3 version, you can also do that. It's up to you.

4 THE WITNESS: Which binder is it?

5 THE COURT: You have a couple of binders there?

6 THE WITNESS: I have a cross.

7 THE COURT: It should be in there.

8 Is it in that binder?

9 MR. WILKERSON: It is.

10 THE COURT: So if you look for DX359 you should find
11 it. It might be easier that way.

12 MR. WILKERSON: May I approach?

13 THE COURT: Yes.

14 THE WITNESS: Thank you.

15 Q. Do you see in the PS -- I will just focus on the first
16 sentence -- it says -- Adam small says -- remind us who that
17 was?

18 A. General counsel of Major Energy.

19 Q. He says, "P.S - I would really like two hours of yours and
20 Elliott's time to review the PA settlement and how we are going
21 to carry out our obligations." Right?

22 A. Yes.

23 Q. So let me ask you. Now, again, after having read this, do
24 you recall being involved in the process of implementing the
25 obligations imposed by the PA settlement?

K357HOR1

Wolbrom - cross

1 A. I don't. And I don't know what those obligations are. I
2 don't know if he is talking about financial obligations or
3 customers. I just don't know what those were. And I don't
4 recall having a two hour meeting with I think it was Dan and
5 Adam about this specifically.

6 Q. Let's turn to DX290, James.

7 Let's go to page 40. Do you see there at subheading B
8 it says "Respond Power shall increase internal quality control
9 efforts to include at least the following..." and then it has a
10 list?

11 A. Yes.

12 Q. And just to take a few examples, it says that "Respond
13 Power shall record all communications between customers and
14 Respond Power's customer service representatives." Right?

15 A. Yeah, we were doing that before.

16 Q. And in (ii) it says "Respond Power shall require its
17 telemarketers to record all communications with customers that
18 result in a sale." Right?

19 A. We did that before even if it wasn't a sale. We did that
20 before.

21 Q. OK. And if you go to (iv), it says "Respond Power shall
22 implement a provision in its contracts with telemarketers that
23 no commissions shall be paid for any enrollment unless a
24 recording of the entire sales presentation to that customer is
25 supplied to Respond Power within three days of the sale."

K357HOR1

Wolbrom - cross

1 Right?

2 A. That also I also believe we had. And it's very possible we
3 didn't bring -- or at least I didn't bring on any new
4 telemarketers from the date this came out. So, yeah, I mean
5 that's my comment on it.

6 Q. And if we look at (v, (v) says "Respond Power shall on a
7 weekly basis review a statistically valid sample of calls
8 recorded pursuant to the prior paragraph from each of Respond
9 Power's agents and third-party contractors in order to evaluate
10 the sales practices employed."

11 A. That was also something we did before. I don't know what
12 they're calling "statistically valid" quote unquote, but we
13 more than spot checked the quality control sales of every
14 vendor before this.

15 Q. Did Major Energy have a chief compliance officer before
16 this?

17 A. I don't know if that was the title of the person. I do
18 recall a chief compliance officer, the title. I don't know
19 when that title was created. Did we have an employee or
20 employees in the company doing compliance work? Absolutely.

21 Q. And who were those employees?

22 A. Well, Adam Small would be one. I think there was someone
23 Trevor, Trevor Stanley was somebody else there as well. There
24 was also some cross work between my department and Adam's
25 department. We had sort of a liaison quality control person

K357HOR1

Wolbrom - cross

1 who was involved in most meetings between Adam and I, so that
2 she would ultimately execute a lot of these checks. So
3 somebody who would be reviewing a sample of calls would be
4 someone who may not be in Adam's department necessarily -- it
5 could be either it was my department or a nondepartment -- we
6 weren't very corporate in a sense -- but there were a number of
7 people engaged in compliance-related work on an ongoing basis
8 every single day with every vendor.

9 Q. And were you aware of a door-to-door management team within
10 Major Energy in 2016?

11 A. A door-to-door management team?

12 Q. Yes, sir.

13 A. Well, while I was there, the door-to-door vendors -- and
14 all of our sales vendors on the residential side certainly --
15 were under my purview, and so that may be me, that may be
16 someone that worked for me, maybe multiple people. I don't
17 remember there being an official department or whatever the
18 term you just used.

19 Q. And if that door-to-door management team was implemented at
20 Major Energy after you left, you wouldn't know about it, right?

21 A. Right.

22 Q. Do you recall the creation of that door-to-door management
23 team being a requirement of this settlement agreement?

24 A. I'm not aware of the details of the settlement requirement,
25 but it seems like from the description of it at least we

K357HOR1

Wolbrom - cross

1 already had that.

2 Q. You didn't have a door-to-door management team, did you,
3 sir?

4 A. We had a group of people who managed the door-to-door
5 vendors and every vendor. We didn't give titles to tasks. We
6 also weren't overstaffed, so the management of the door-to-door
7 teams and every vendor was under my control. So by proxy we
8 had a door-to-door management team. We didn't have plaques on
9 our doors that said that, but that's what we did from day one.

10 Q. Did you ever meet somebody named Heather McGuinness?

11 A. No. I don't believe so.

12 Q. You mentioned earlier that you had WhatsApp communications
13 with Mr. Sobel, right?

14 A. Yes.

15 Q. Let's turn to 813, James, and let's go to page 39.

16 THE COURT: DX813?

17 MR. WILKERSON: DX813.

18 Q. Mr. Wolbrom, I recognize the format of these WhatsApp
19 communications are not what you would see on your cell phone,
20 but if you turn to the body, that's what we are going to be
21 focusing on between you and Mr. Sobel.

22 So if we start at the top, you can see at the very far
23 right this is 10/31/16. Can and you see that the from is
24 from --

25 A. I'm sorry. Would you mind getting rid of that blow-up

K357HOR1

Wolbrom - cross

1 screen? I can read it fine, but I would just like to see more
2 context.

3 Q. Sure. You can see the from is from David Sobel. Just so
4 we don't have to do this every time, the participants column
5 shows who are the participants of the chat. The from shows who
6 it is from and, and then the body of the content of the
7 message.

8 A. What is the column all the way on the left?

9 Q. That is the chat number. It's just a serial number for
10 each individual chat, as I understand it. That's my
11 understanding.

12 So in the body Mr. Sobel says, "If we're going to
13 gossip, rather keep it just between us. Hope that's OK."

14 And he continues talking. "You talking about Moeller?
15 What did he want? He's coming around about Dan and all
16 slowly."

17 And you say "LOL. Sorry."

18 Do you see that?

19 A. I do see that. You're reading it with a certain tone that
20 I don't know that that was the tone. I mean these are WhatsApp
21 conversations, bar talk, if you want to call it slang, so I'm
22 just saying the emotion with which you're reading it is not
23 necessarily accurate.

24 (Continued on next page)
25

K35AHOR2ps

Wolbrom - Cross

1 Q. Would you like to read it instead?

2 A. No, I would not, no. I'm just saying, stating that.

3 Q. I'll try it without too much emotion in there.

4 A. Can you have all this before this, or this would be the
5 first message? They seem out of context.

6 Q. So this is -- you can see at the very top, this is David
7 Sobel saying, "If we're going to gossip, rather keep it between
8 just us." Right?

9 A. Right.

10 Q. That's a creation of a new chat?

11 A. I don't believe it created a new chat, no.

12 Q. OK, but that's what he said.

13 A. I'm having a -- I've never seen this. This isn't the -- a
14 format I'm familiar with. But it just looks like David sent me
15 a message.

16 Q. Do you recall having communications with David Sobel in
17 October 2016 via WhatsApp?

18 A. Right. I don't remember any specific conversations, but
19 I'm reading it. I'll try and provide the, you know, whatever
20 narrative I can on this. But this is quite a long time ago.

21 Q. OK. So picking up where we left off, David Sobel says,
22 "Not to defend Levy, because he was an asshole for quite a
23 number of months" --

24 A. Hold, just one thing. I see the message before, where I
25 say, "LOL sorry," seems to be numbered 357145. Now we jump to

K35AHOR2ps

Wolbrom - Cross

1 357152. So it looks like there's several messages missing
2 there.

3 Q. That's correct.

4 A. OK. Well, it looks like this is pieced together. It would
5 be hard to comment if you're cutting out certain messages.

6 Q. If you would like your attorneys to enter in additional
7 messages, they can certainly do that.

8 A. And I'll try and answer to the best of my ability. It just
9 looks like this is pieced together and missing stuff.

10 Q. OK. So Mr. Sobel tells you, "Not to defend Levy, because
11 he was an asshole for a number of months, but I think he is
12 starting to come around."

13 He continues, "There was a good couple of weeks where
14 I really didn't talk to him. I started up the past 1-2 weeks
15 and he's beginning to see things differently, or, rather, in a
16 new way, and through some people."

17 And then you say, "Even pre-Dan, he wouldn't wish
18 someone well. It's odd." Dan is Dan Alper?

19 A. Presumably.

20 Q. And then you continue, "Man, you should hear and see the
21 shit people in the company are saying about Dan Alper." "DA,"
22 that's Dan Alper, right?

23 A. "DA" would be Dan Alper, yeah. I'm just trying to follow
24 who's saying what.

25 Q. I'll try not to go too fast. If I go too fast just let me

K35AHOR2ps

Wolbrom - Cross

1 know.

2 A. Because it's saying people in the company, and it seems
3 that date is 10/31. I believe I was already gone at 10/31, so
4 it's saying people in the company -- I just want to make sure
5 this is me talking and not David. The format is very confusing
6 for me to read -- comment on, I should say.

7 Q. You maintained communications with certain Major employees
8 after you quit, right?

9 A. Yes.

10 Q. Your next chat is, "I'm stunned."

11 And then Mr. Sobel responds, "Pre-Dan, he was just
12 socially awkward Levy, bit like MW" -- that's Mark Wiederman,
13 right?

14 A. Yeah, presumably.

15 Q. -- "who never says GM to any of the cubicle people when he
16 passes by every a.m. Post-Dan he became cocky arrogant Levy.
17 Also very, very confused Levy IMO." Is "IMO" in your opinion?

18 A. I didn't write this because it's David. Not this -- I
19 believe IMO is "in my opinion," but I could be wrong. David
20 was an accountant, so I don't take anything for granted, or is
21 an accountant.

22 Q. That's fair. And when he says "GM," do you take that to
23 mean "good morning"?

24 A. Where it says "good morning"? That's what he's saying. I
25 didn't experience that, but that's what he's saying.

K35AHOR2ps

Wolbrom - Cross

1 Q. And then he continues, "Not to give MW a pass, he's become
2 an asshole of sorts. Very sad, as he as the consummate nice
3 guy." Do you see that?

4 A. Yeah.

5 Q. And then he says, "Dollar sign changes people." Right?

6 A. Yeah.

7 Q. Is it fair to say, based on this message, that there were
8 some interpersonal conflicts at Major Energy related to its COO
9 in October of 2016?

10 A. No. I wouldn't say that. It, again, I'm happy to talk
11 about the environment of Major Energy pre sale, post sale. But
12 it's very hard to extrapolate what somebody was feeling off of
13 a pieced-together WhatsApp conversation, especially, I don't
14 remember the exact date I left, but we're talking days, maybe
15 one or two weeks. I don't know what was going on. Maybe --
16 it's very hard for me to tell, to comment on what someone else
17 was feeling about a third person through this pieced-together
18 WhatsApp.

19 Q. OK. We just have the words on the page, right?

20 A. We have the words that were put on this page, yeah.

21 Q. And if you go down to the second-to-the-last chat on this
22 page, this is from Mr. Sobel to you. He says, "Back to our
23 favorite CEO, I know the cube guys can't stand him as well as
24 CTO and counsel. That pretty much covers everyone." Do you
25 see that?

K35AHOR2ps

Wolbrom - Cross

1 A. Is this something I said?

2 Q. No.

3 A. "Our favorite CEO," "cube guys," "can't stand the CTO and
4 counsel." Again, this is, David seems to be speaking for other
5 people to me right after I left. I don't know the context of
6 it or what was going on in his -- in his mind.

7 Q. And then turn to the next page.

8 A. What's that?

9 Q. Turn to the next page.

10 Before we start reading here, do you recall that there
11 were some interpersonal conflicts regarding Dan Alper at Major
12 Energy, right?

13 A. But between -- between whom and whom?

14 Q. Between Dan Alper and others at Major Energy?

15 A. I can only speak to my relationship with Dan, that that has
16 essentially two parts, pre sale and post sale. What other
17 people were feeling about anybody else would be, would be --
18 would be -- I wouldn't know. Would be completely speculation,
19 and you'd be asking me to go back for four years. I don't know
20 what was going on between other people and them. I can only
21 talk about myself.

22 MR. WILKERSON: Let's go to the top of this page,
23 James. And we'll go about two thirds of the way down. You can
24 put up the whole page so that Mr. Sobel and Mr. Wolbrom can see
25 it.

K35AHOR2ps

Wolbrom - Cross

1 A. Thank you.

2 Q. Let's just start at the top. This is you to Mr. Sobel,
3 "Yup, and people downstairs, both sides of the wall."

4 Mr. Sobel responds, "Meaning CTO and counsel can't stand him,
5 not that they can't stand CEO and CTO. Oops."

6 Then David Sobel said, "It is a problem. I'm aware of
7 it and so is Levy." That's Levy Moeller?

8 A. Presumably.

9 Q. "Not sure what we can do." He continues, "Can't be a CEO
10 and run it like a salesman. People see through your bullshit
11 after the second time."

12 And you respond, "If the end game was selling and
13 hitting numbers for three years or having Spark buy out the
14 earnout, then who cares from his perspective?"

15 David then responds, "Not sure what you mean."

16 And you continue, "Meaning Dan doesn't need to be a
17 CEO type if the goals were to just sell the company and figure
18 out a way to hit the earnout. Not like he needs to grow the
19 company, innovate, build culture, and all the CEO-type things."

20 David then responds, "OK, but then he's going to piss,
21 or rather is, people off one by one, and that will make hitting
22 the numbers that much harder."

23 And you say, "All he has to do is not fuck up and piss
24 people off."

25 David then responds, "We don't hit the earnout without

K35AHOR2ps

Wolbrom - Cross

1 new ideas. You know the door-to-door model as it stands is not
2 working, definitely not growing, perhaps just replacing churn."
3 Do you see that?

4 A. Yes. I'm with you.

5 Q. OK. And then he continues, "Well, as you know, he is
6 pissing people off. So it's not working, whatever he's doing."

7 And you said, "Believe me, I know. Flawed model,
8 flawed industry. 50 percent why I left was Dan Alper." Do you
9 see that?

10 A. Yeah.

11 Q. Was that a truthful statement when you made it at the time?

12 A. Well, it's more than a yes-or-no question -- yes or no
13 answer, rather. So I -- if it's OK, I would give some context
14 to it.

15 Dan Alper, as I mentioned before, as I alluded to
16 before, my perception of Dan has two stages. There was Dan
17 Alper pre sale, when he came to the company. I believe it was
18 around Thanksgiving time of 2015, maybe a little bit before.
19 And then there was post sale.

20 My relationship with Dan, in the beginning, was fine.
21 It was even good. Obviously a new, a new CEO coming in to what
22 I felt was an incredible team is always going to have its
23 challenges, with different personalities. But for the most
24 part Dan and I did quite well. In fact, Dan and I went away
25 for a couple days, out of his office, to bond and connect, and

K35AHOR2ps

Wolbrom - Cross

1 we had all -- we actually had a lot of, back in the office,
2 personal discussions about personal growth and things like
3 that.

4 Dan and I got along just fine, the way a C -- the way
5 a superior and, you know, an employee would be expected to
6 have. That was up until the sale. After the sale, in my view,
7 Dan changed dramatically. So there's two Dan Alpers. Here,
8 when I say fif -- well, when I say "50 percent why I left was
9 Dan Alper," on 10/31/2016, mind you, a week or two, whatever
10 the date was, after not only leaving the company that I helped
11 build, loved, I mean really loved, to leave a completely
12 different industry, so you have to just take, again, the
13 WhatsApp conversation in context. Dan Alper, after the sale,
14 to me was Spark. Dan was Spark. To me, Dan was Spark's
15 representative in New York. When Dan would travel and he would
16 come back, he would report from Spark: Spark said this, Spark
17 said that. So I equated Dan as the Spark face for our company.

18 So, yes, I am saying here 50 percent why I left was
19 Dan Alper. What I am largely alluding to here, a week or two
20 after I left, on a WhatsApp conversation with, obviously, you
21 know, not a colleague but a former colleague who is going
22 through some, in that moment, difficult times, that's the
23 context behind when I say 50 percent why I left was Dan Alper.
24 That's referring to the Spark culture that he brought, or that
25 he was passing on, I should say, and fusing our, you know,

K35AHOR2ps

Wolbrom - Cross

1 well-oiled company with. So I equated the acquisition and the
2 new world we lived in as being Dan Alper, because he was the
3 one executing it. That's what I'm referring to when I say "50
4 percent why I left was Dan Alper."

5 Q. When you said "50 percent why I left was Dan Alper," was
6 that a truthful statement?

7 A. I didn't sit down with an actuary and a psychologist to
8 discuss my feelings and 50 percent was what we came out with.
9 I was very frustrated when I left Major Energy due to Spark's
10 involvement. As I said before, Spark's involvement was largely
11 executed by Dan. Dan was the face of Spark to me in Major
12 after the sale. And so when I say "50 percent why I left was
13 Dan Alper," I'm referring to the Spark involvement, which was
14 actualized to me by Dan. Whether it was truly 50 percent, I,
15 like I said, I have not run an analysis with an actuary and a
16 psychologist of how I was feeling. And keep in mind this was
17 one or two weeks after I left the company that I gave my heart
18 and soul to. So this was -- that's the context.

19 Q. That was a few years before you wrote your witness
20 statement, right?

21 A. Pardon me?

22 Q. This was a few years before you wrote your witness
23 statement in this case.

24 A. 10/31. My statement was 10/19, I believe.

25 Q. When you said that the door-to-door model is flawed, you

K35AHOR2ps

Wolbrom - Cross

1 intended that to be a truthful statement when you wrote it,
2 right?

3 A. I said the door-to-door model is flawed? Where did I say
4 that?

5 Q. That is in row 357183. You say, "Believe me I know, flawed
6 model, flawed industry." Do you see that?

7 A. Well, David had the previous comment. "Flawed model"
8 doesn't necessarily refer specifically to door-to-door. Again,
9 the context of this off-of-cuff WhatsApp conversation two weeks
10 after I left the industry that I -- which is all I knew for the
11 last four years, is probably referring to more than just the
12 door-to-door model, and that was a truthful statement back
13 then, and I think it's a truthful statement today.

14 And that was one of our, our goals at Major Energy
15 before the sale, was to try and change that and create a
16 different environment, a different experience for our
17 customers. And quite frankly, through the work that our entire
18 group did, we, you know, we did that. We created a different
19 kind of a culture. We created a brand. And it's still flawed.
20 I mean, there's issues. You know, I went from there into the
21 healthcare world for a couple years. And the healthcare world
22 has got its flaws. So saying that something is flawed, yeah,
23 it's true. It is still flawed. And to this day, I'm trying to
24 work with those conditions and trying to change it.

25 Q. And Major's business had been built mostly on the

K35AHOR2ps

Wolbrom - Cross

1 door-to-door model, right?

2 A. No. Major Energy, I don't know the split between
3 commercial, residential as a whole, so I wouldn't be able to
4 say largely. Major Energy had different verticals. Our
5 commercial business, which was a big part of our business, to
6 my knowledge, was not built on the door-to-door model. That
7 was built on relationships, sponsorships, and good pricing, and
8 relationships above all. Our residential book was built
9 largely through door-to-door.

10 Q. Is it fair to say that most customers that Major Energy had
11 in 2016 came to the door-to-door model?

12 A. I mean, I just commented on that. I don't, if you take a
13 look at all of Major Energy's customers and RCEs, I don't know,
14 I couldn't tell you a breakdown of where they came from
15 offhand.

16 Q. There are presentations to show, but we don't have time to
17 get into it.

18 Were you being truthful when you said that the
19 industry was flawed?

20 A. I felt, on 10/31/2016, a week or so after leaving the
21 industry that I lived those fewer years, that there were flaws
22 in the industry. And I still feel that way today.

23 Q. Let's turn the page. Well, before we turn the page, you
24 mentioned Dan, kind of going back to your comment of Dan being
25 one and the same with Spark. Dan remained the CEO of Major

K35AHOR2ps

Wolbrom - Cross

1 after the sale of Major to NGE, right?

2 A. After the sale of NGE, he was the CEO of Major Energy, yes.

3 Q. As far as you know, he was not a Spark employee, was he?

4 A. I really do not know the dynamic of any employee, unless
5 they reported to me, between them and Major versus them and
6 NGE, them and Spark. That's just not something I have any
7 knowledge about.

8 Q. And you don't mention the word "Spark" in your WhatsApp
9 communications on this page, do you?

10 A. I have -- there are literally tens of thousands of messages
11 before and after between David Sobel and a million people. I'm
12 sure that the name Spark comes up a number of times. This
13 sheet that you're showing me, that, again, was pieced together,
14 because clearly you're missing messages here, I didn't -- I
15 mean, you can do control-Find. I didn't -- my eyes didn't
16 catch the word "Spark," but it's possible I did if you go down
17 a little bit. I don't know.

18 Q. So if you look on the left-hand side, you can see the
19 numbers sequentially from 72, 73, 74, 75, and so on through the
20 last message that we read, which was 184. Right? Are there
21 any numbers missing?

22 A. In these 14 messages out of what's probably 20,000, I don't
23 see the word -- actually I do see the word "spark" in the body.
24 It's highlighted about, I don't know, a third down. I don't
25 know if that was me or David, but I do see the word "Spark," if

K35AHOR2ps

Wolbrom - Cross

1 that's what you're asking.

2 Q. Referencing the Spark buyout, right?

3 A. Yeah.

4 Q. And that's the only reference to Spark on this page, right?

5 A. In these 13 messages --

6 Q. In these 13 messages. I apologize.

7 A. -- I think that's the only place that I see Spark.

8 Q. Let's turn to the next page, page 41. This one I think

9 will go a bit quicker, Mr. Wolbrom. It starts out with David

10 saying -- and this is 12/4/2016, David saying "Nechemia quit

11 every two weeks. Finally. Couple of weeks ago it was for

12 good. Silly of him, if you ask me, as he doesn't have anything

13 lined up. But he was never a rational one." Who is Nechemia?

14 A. If it's the person I think he's referring to, Nechemia,

15 what was the last name? I think Schorr maybe. If this is who

16 he's referring to, I believe Nechemia worked on the supply

17 team.

18 Q. Worked with Levy Moeller?

19 A. He worked for Levy Moeller for the sale, possibly after. I

20 think that's how -- the reporting structure.

21 Q. And then you respond, "Oh, boy." And you keep going, "He

22 literally left and hasn't been there? That's so crazy. I

23 think MW will take people from MES or NUD if they lose their

24 jobs." That's "nud" or "nude"?

25 A. I think it's "nude." I that's what it is. If I

K35AHOR2ps

Wolbrom - Cross

1 understand, I believe that's some other business that he had.

2 Q. And then you continue, "Sam, Amir.... may be a bad read but
3 I wonder." And Sobel responds, "For NUD?" And you say, "Yeah,
4 why not?" And Sobel says, "What's NUD?" And you say, "You're
5 joking." And he says, "Not today. Oh, the vitamins." And you
6 say, "Yes, Suite 220. Not thriving?" And he says, "LOL, who
7 knows."

8 Is it fair to say that Mr. Wiederman had another
9 business in the same building as Major Energy?

10 A. I honestly have no idea of the ownership, management. I
11 don't know anything about this company. I knew that there was
12 a company called what I think is NUD. Who owned it, where it
13 was, again, this is already four months after I left. I just
14 don't know the context of it. I have no idea what prompted
15 David to message this to me in '12. But what Mark had, I have
16 no idea. I'm sure Mark had and hopefully does many business
17 interests. I just don't know anything about it.

18 Q. When you say "Suite 220," you're referring to Suite 220 in
19 Major Energy's building, right?

20 A. Probably. I would imagine so.

21 Q. That's where Nutrition was based, right?

22 A. I don't know where it was based. I don't know -- could be
23 this was Mark's office. I think Mark -- maybe Dan's office or
24 Saul Horowitz's office. I really don't remember the context of
25 this.

K35AHOR2ps

Wolbrom - Cross

1 MR. WILKERSON: Let's go to page 42, James. And we'll
2 start at entry 358242. It's toward the bottom of the page,
3 James. 358242.

4 Q. Mr. Wolbrom, do you see that?

5 A. On the bottom. Yeah. I'm just going to read -- I can't
6 read the message before because you cut out 11 of them, it
7 seems. I don't know what -- again, this is totally out of
8 context, but, OK, I see what you highlighted there.

9 Q. So you say, "I actually texted Mark Wiederman. He blocked
10 me on WA." Is "WA" WhatsApp?

11 A. Yeah.

12 Q. "Before RH." Is that Rosh Hashanah?

13 A. Yeah. Very good.

14 Q. I try.

15 A. Yeah. That's it.

16 Q. "But no response," sad face. Do you see that?

17 A. I do.

18 Q. And David Sobel said, "Don't know what's going on with him.
19 Sometimes I feel bad for him, with all that's going on with
20 him. And other times I resent him. And this is between me and
21 you, of course." And you say, "Of course." You see that?

22 A. Yeah.

23 Q. Sometimes after 2017, did you reconcile with Mr. Wiederman?

24 A. What do you mean "reconcile"?

25 Q. It was true that he had blocked you on WhatsApp, right?

K35AHOR2ps

Wolbrom - Cross

1 A. I don't -- I had sent a message to Mark before the Jewish
2 New Year wishing him, and it didn't go through. I don't know
3 what that was about. I didn't randomly message him. There
4 must have been a reason. When you say "reconcile," I don't
5 know that there was a need to reconcile. I didn't have a great
6 falling out, nor I did read anything indicating of a falling
7 out. If there's something you'd like to show me indicating
8 otherwise, I'll have to see it. But all I said here is that
9 I -- again, we're missing 11 messages before that, went from
10 230 -- we're on September 25th. You have 358231, and then you
11 cut out 11, and then it says "I actually," so I'm responding to
12 something, but you cut it out. So I can't comment. I don't
13 know what's missing here.

14 Q. The only question is, did he block you on WhatsApp?

15 A. I don't know what he did. My messages didn't go through,
16 so perhaps I was telling him that my message didn't go through.

17 Q. You were telling Mr. Sobel, your words were, "He blocked me
18 on WhatsApp."

19 A. I wouldn't know what Mark did or did not do on his phone.
20 So I can't comment on it. And this isn't sworn testimony.
21 This is me talking with him on WhatsApp presumably around the
22 Jewish New Year or maybe right after that.

23 Again, you have to show me what I wrote before that to
24 give you a proper answer. I don't know.

25 Q. All I'm asking is, did you use the words "he blocked me on

K35AHOR2ps

Wolbrom - Cross

1 WhatsApp"?

2 A. I typed the words "he blocked me on WhatsApp," yes I did.

3 Q. And then you also said you had texted Mark Wiederman for RH
4 but no response. Those were your words right?

5 A. Not all. I said, "I actually texted Mark Wiederman (he
6 blocked me on WhatsApp before Rosh Hashanah) but no response."

7 Q. Those were your words?

8 A. Yeah. There were a lot of people I texted on Rosh Hashanah
9 that didn't respond.

10 Q. Are you testifying that you did not have a falling out with
11 Mr. Wiederman around the time that you quit from Major Energy?

12 A. Can you define what "falling out" means, please.

13 Q. A disruption in a relationship.

14 A. I had a disruption in a relationship with a lot of people I
15 work with, as a result of Spark getting into the picture. I
16 wouldn't call it a falling out. I felt that I needed to leave
17 because the interference between Spark and what we did have
18 was, was too much for me to handle. It wasn't what I was told
19 was going to happen. Mark was my boss and so -- again, I
20 wouldn't call it a falling out. I didn't feel it was in my
21 best interests to stay there under Spark's regime anymore.

22 MR. WILKERSON: Can you please turn, James, to page
23 45. And we will read the bottom of 45 and the top of 46. And
24 we'll start at message 358629. And here you tell Mr. Sobel,
25 "Just read the entire lawsuit. Nechemia gets an honorable

K35AHOR2ps

Wolbrom - Cross

1 mention but I don't," question mark, exclamation point. Sobel
2 says, "LOL, I just read it for the first time as well. Scary
3 stuff. Nechemia by name is not here. And you left because of
4 Alper," exclamation point.

5 And turn the page. You respond, "I left because I
6 didn't trust Alper or think he had MES's best interests in mind
7 and because he was divisive, home wrecker, was dramatically
8 hurt by Mark Wiederman, that my only thank you for the \$80
9 million sale was in the form of a pathetic \$60,000 gross
10 signing bonus, which locked me out of leaving to competitor,
11 from Spark. Did not like the working environment of a public
12 company and the BS reporting, and didn't have faith that the
13 industry would last." Did I read that correctly?

14 A. Yes.

15 Q. Those are your words, right?

16 A. Yeah, seems that way. Yes.

17 Q. And you wrote that in October of 2017, right?

18 A. Yes.

19 MR. WILKERSON: No further questions for Mr. Wolbrom.

20 THE COURT: All right. Thank you.

21 Redirect?

22 Do you have any exhibits you wanted to offer?

23 MR. WILKERSON: Yes, your Honor. Defendants would
24 offer Plaintiff's 253, Defendant's 302, Defendant's 213, and
25 Defendant's 359.

K35AHOR2ps

Wolbrom - Redirect

1 MR. BROWN: And, your Honor, just briefly. Perhaps
2 this matter, I think it came up even yesterday or the day
3 before, but I want to make sure the record is clear. The use
4 of the WhatsApp messages in the presentation form, it has the
5 "redacted for relevance" boxes not there on the screen, so
6 there are redactions for relevance on various of the WhatsApp
7 records.

8 THE COURT: OK.

9 MR. MAROONEY: And just so we're clear, if this was a
10 jury trial, we would be having a huge fight over this, but
11 we're just letting it go because --

12 THE COURT: Understood. I appreciate that and will
13 take it into account.

14 Those exhibits mentioned by Mr. Wilkerson are received
15 in evidence.

16 (Plaintiff's Exhibit 253 received in evidence)

17 (Defendant's Exhibits 302, 213, and 359 received in
18 evidence)

19 THE COURT: And Ms. Corey.

20 MS. COREY: Thank you.

21 REDIRECT EXAMINATION

22 BY MS. COREY:

23 Q. Mr. Wolbrom, you were asked today about certain regulatory
24 issues. Do you recall that?

25 A. Yeah.

K35AHOR2ps

Wolbrom - Redirect

1 Q. As the chief marketing officer, what was your role in
2 managing and maintaining Major's regulatory compliance?

3 A. So Major Energy, one of the great things about Major Energy
4 is that we worked as a cohesive group. It wasn't just the
5 marketing department. It was sales. It was marketing. It was
6 customer service. And it was compliance with LIPA. And so
7 whether it was starting with a new vendor, Adam and I -- Adam
8 is, as I said, our counsel -- would work on scripting strategy,
9 advertisements we had. It would go through a regulatory look.
10 He would look at it and make sure that I was doing my job from
11 a compliance perspective. I'm marketing it up, you know,
12 putting the marketing lingo and whatnot, send it back to him,
13 and then we would execute it. It went like that for trainings
14 we did with our vendors, training we did with our
15 telemarketers, our customer service reps. Everything we did
16 had the DNA of marketing sales and compliance in it. We worked
17 as a people to make sure that those out in the field doing the
18 selling were compliant, and if they weren't, we had a process
19 for either retraining, terminations, suspension, and that sort
20 of a thing. So my involvement in regulatory was effectively
21 taking what I was told the rules are, packaging it in a
22 marketing way so that we can get customers, and then showing it
23 to Adam, making sure everything was good, and then going live.

24 Q. And, Mr. Wolbrom, in your experience, are regulatory
25 actions common in the energy industry?

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Wolbrom - Redirect

1 A. Yes.

2 Q. I believe in the WhatsApp chat -- I don't know if I can
3 recall the exact quote, but you said "flawed model, flawed
4 industry." Do you recall that?

5 A. Yes.

6 Q. And I think you said that you still believe that to be
7 true.

8 A. Yeah, I do.

9 Q. OK. Does that mean it can't be -- it's not profitable --

10 A. No. No. Conversely, it's very profitable, if you know
11 what you're doing. I think every -- I think every industry --
12 and I'm not in every industry, but I think every industry has
13 its problems. There's really nothing perfect. Maybe a school
14 teacher. But every industry has its issues, and if you're
15 great at your job, you work within the confines that are, you
16 know, presented to you, you deal with it. And that's what we
17 did.

18 Q. Mr. Wolbrom, counsel asked you about Major Energy's vendor
19 and broker relationships. Do you recall that?

20 A. Yes.

21 Q. And I think you referenced a deteriorating relationship
22 with certain vendors?

23 A. Yes.

24 Q. I'd like to show you PX 166. This is an e-mail from you --
25 no, from Mark Wiederman. Well, I will go to the second one.

K35AHOR2ps

Wolbrom - Redirect

1 From you to Dan Alper, copying Mark Wiederman, sent on
2 September 14, 2016. Do you recall that?

3 A. Yes.

4 Q. And you say, "Couldn't connect with Javier but I did get
5 the attached from Sunil. Kind of hard to decipher, but Javier
6 clearly went after Sunil, which is wrong, considering he never
7 knew who Sunil was until I told him, because I had to." Do you
8 see that?

9 A. Yes.

10 Q. Do you recall sending this e-mail?

11 A. Yes.

12 Q. Could you just give us some context.

13 A. Yes, absolutely. Absolutely. So after the sale, Javier
14 Garcia, I believe, who represented himself as being one of the
15 salespeople for -- or one of the channel managers, or the
16 channel manager for Spark -- came down to our offices, or came
17 up to our offices in New York, and sat me down and wanted the
18 lay of the land, how, how, you know, Elliott Wolbrom's team
19 interacted with the vendors. He wanted to know who those
20 vendors were. He had never -- he had never heard of PTM. I
21 recall that. He asked me who he was or where he lived. He was
22 asking for details about how much we were paying, where did we
23 market, how was he successful. And then he asked me for
24 contact information for him.

25 I remember at that time I, I wasn't, you know, suspect

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Wolbrom - Redirect

1 of anything, but it sort of landed in a negative light. I was
2 trying to figure out why Spark's channel manager is asking the
3 chief marketing officer and also the head of sales of Major
4 Energy, who has to hit numbers, for information about their
5 vendors. It's not only information about their vendors,
6 information about my most prized vendor, on a personal and
7 professional and presumably profitable level.

8 Q. And I think the first line says, "Couldn't connect with
9 Javier but I did get the attached from Sunil." Did you ever
10 connect with Javier on this issue before this e-mail?

11 A. I don't believe so. I can't recall. If you show me a
12 document otherwise. I don't remember getting in touch with
13 him. I remember him wanting all this information from me.

14 Q. I'd like to show you PX 184.

15 MS. COREY: Eric, if we could look at the bottom
16 e-mail, the early side of the e-mail. Might be on the second
17 page, I think. Well, start -- yes, thank you.

18 Q. OK. So this is an e-mail from Sam Bensinger to you, sent
19 on May 19, 2016. Do you see that?

20 A. Yes.

21 Q. Who is Sam Bensinger?

22 A. Sam Bensinger worked for me at Major Energy. He was sort
23 of Javier's counterpart, if I can call it. He was our channel
24 manager. He was the day-to-day contact between Major Energy
25 and our vendors.

K35AHOR2ps

Wolbrom - Redirect

1 Q. And Sam says, "I received a call from Sunil today very
2 upset. He's telling me that his managers and teams are being
3 solicited to join a different marketing group by either 'WMS',
4 'Immerge,' or 'EGC' to sell Spark enjoy in NYC. They are
5 trying to steal all his NYC Major Energy offices by offering
6 them more money (80 percent electric no usage, 80 percent gas
7 no usage) to sell Spark."

8 In the second paragraph it says, "Please let me know
9 if there's something we can do to help since we are all on one
10 team now. As a general rule Major Energy teams should be off
11 limits by all marketers selling for Spark. Let them target
12 other ESCOs teams like Starion Energy, who is selling against
13 us in NYC." Do you see that?

14 A. Yes.

15 MS. COREY: Can we go to the next e-mail.

16 Q. So, Mr. Wolbrom, you sent this e-mail to Mark Wiederman and
17 Dan Alper, and it looks to me like you sent it on --

18 MS. COREY: Could we expand this so we can see the
19 to/from on the prior e-mail. Thank you.

20 Q. You sent it on the same day, and in the same minute. Do
21 you see that?

22 A. Yeah.

23 Q. Why did you forward that to Mark Wiederman and Dan Alper?

24 A. Because this is the -- this is the most troubling e-mail I
25 could have -- I could have ever received. And mind you, this

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Wolbrom - Redirect

1 is not literally but right when things were happening with --
2 right when they started -- right when the acquisition happened.
3 Here you have my most prized marketer, somebody I had a
4 personal relationship with, someone we had a professional
5 relationship with, I meet with, and I'm basically getting a
6 call -- I'm getting an e-mail from Sam, whose job is to report
7 to me, telling me that Spark -- that, that, that vendors
8 selling for Spark went to PTM, which is Sunil's company, and
9 are offering them more money than we were paying them,
10 essentially trying to not only -- not only pull away our most
11 prized vendor but by paying them more money. So he put us in
12 an impossible spot. This was a personal attack, I took it, and
13 certainly on a -- on a business level. And so this was like
14 red alarm, red alarm, 911. And I got an e-mail, presumably
15 flipped out, and forwarded it to my bosses.

16 Q. OK. And then in the next e-mail Mark Wiederman responds to
17 you and Dan Alper. He says, "Agreed. The rule you suggested
18 is still in place and no one should be targeting our reps.
19 Sunil needs to do whatever needs to get done to keep his reps
20 regardless if Spark or anyone else poaching them." Do you see
21 that?

22 A. Yes.

23 MS. COREY: Eric, could we go to the top e-mail.

24 Q. And then you write back to Mr. Wiederman, "That's already
25 implied but Sunil was asking us to intervene with Spark since

K35AHOR2ps

Wolbrom - Redirect

1 he's under the assumption we're all under the same roof now."

2 Do you see that?

3 A. Yes.

4 Q. Do you recall what if anything happened after this e-mail
5 exchange with --

6 A. Well, yeah. I mean, what this is is, it's not just -- it's
7 not just Spark, who was supposed to be letting us do what I --
8 you know, what we do and continue to grow, and not interfere by
9 stealing him away and -- by paying him more money. But what
10 it's also clearly doing, since -- just based on what I'm saying
11 here, since he's under the impression -- under the assumption,
12 that it's confusing the heck out of him.

13 And so, having been in this industry for a while, the
14 worst thing is a worried vendor, because vendors need
15 door-to-door marketers and residential marketers, they need
16 consistency, they need assurances. It's not an easy field to
17 play in. The second they start getting mixed messages -- and
18 mind you, they were not fans of Spark's name in the industry.
19 The second they start hearing that maybe what I'm saying is
20 different than -- or maybe that what Spark is doing to him is
21 different than what I said originally, I start losing trust
22 with him, Sam starts losing trust. He didn't know who to
23 believe. Is Spark in charge? Are we under the same roof? Are
24 we not? It's just confusion. Reps need and vendors need
25 consistency. They need assurance. They need to know that,

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Wolbrom - Redirect

1 that, that they're -- the energy company is going to be there
2 for them that day.

3 And what we were so great at, you know, it wasn't just
4 sending them invoices, paying them, and getting customers. We
5 had, I mean, we were literally speaking with them five, ten
6 times a day, on the phone, e-mail, WhatsApp. And so the second
7 there's like a mistrust -- Sunil knew that we were purchased by
8 whatever, a public company, especially as far as he thought.
9 This was confusion for him. And that's the worst thing,
10 because when you're confused, you panic. When you panic, you
11 leave. And there's plenty of other energy companies he could
12 have sold for.

13 So this e-mail here has a little bit of everything:
14 confusion, our new owner competing with us, and ruining a
15 personal and professional relationship.

16 Q. OK. After the sale of Major Energy, did you have any
17 contact with either MGE or Spark's marketing department?

18 A. I recall communicating with somebody there, yeah.

19 Q. I'd like to show you PX 193. And if we could go to the
20 early e-mail, that's page 3 and page 4. This is an e-mail from
21 Lindsey Margiotta to you and copying Eric Melchor. Do you see
22 that?

23 A. Yes.

24 Q. And this is sent on August 16, 2016?

25 A. Yes.

K35AHOR2ps

Wolbrom - Redirect

1 Q. And Lindsey says, "I want to introduce you to Eric Melchor,
2 who leads our marketing team here at Spark. After our
3 requirements meeting, he had a few questions that Saul
4 defaulted to you," smiley face. Do you see that?

5 A. Yes.

6 MS. COREY: And if we could go to the next e-mail,
7 Eric.

8 Q. And then this is your response, and quickly, you say,
9 "Great to meet you, Eric, how can I be of help?" Do you see
10 that?

11 A. Yes.

12 Q. Next e-mail. And Eric writes back to you, and he says,
13 "Nice to meet you. I noticed some of the interesting campaigns
14 you set up at Major. I was wondering if I could chat with you
15 to learn more and hear about some other ideas you have around
16 acquiring customers in the New York market, which is a tough
17 code to crack in my experience. Do you have any availability
18 this Friday morning or afternoon?" Do you see that?

19 A. Yes.

20 Q. Next e-mail. You write back, "I'm fortunate to be part of
21 a great group of teammates here, who all share a goal of taking
22 a highly visionary, strategic, and creative approach to the way
23 we brand and market ourselves. It has been very special, to
24 say the least."

25 And then you say you'll be traveling and that "there

K35AHOR2ps

Wolbrom - Redirect

1 is a wealth of information we can share with each other." And
2 then you ask if there's something you can answer. Do you see
3 that?

4 A. Yeah.

5 Q. OK. The next e-mail. And then he asks you, "Yes, let's
6 touch base when you're here in Texas if you are planning a trip
7 down here."

8 And then he asks one question, "Which campaign for
9 major that you executed generated great results? Feel free to
10 share whatever elements you -- about it you'd like." Did I
11 read that correctly?

12 A. Yeah. Yeah.

13 Q. And then if we go to the top one. You forward this on to
14 Dan Alper and Mark Wiederman. Do you see that?

15 A. Yes.

16 Q. Why did you forward this to Dan Alper and Mark Wiederman?

17 A. So this was my, you know, my initial fear, when a company
18 buys you, realized. Here you had somebody making an
19 introduction between Spark's marketing personnel and myself,
20 perhaps my counterpart, somebody who may be a competitor, one
21 may say, in a merger. And this person basically says, I love
22 what you've done, can you tell me all about it. Now, if this
23 was a reporter doing a story on me or a biography, OK, that
24 feels nice and maybe I'd talk, you know, assuming I was allowed
25 to. But this is somebody who is potentially coming after my

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Wolbrom - Redirect

1 job, saying "I love what you did, can you tell me how you did
2 it." So I sort of blew him off and said, you know, I'm
3 traveling -- I presumably was traveling, but I wanted to just
4 kind of kick it down and see what happens, because I felt
5 threatened, not only personally, which is obvious, but I
6 felt -- I felt Major Energy was threatened.

7 We were, we were great at what we did before Spark's
8 interference because of our proprietary ability to get
9 customers and brand and do things that other ESCOs never did.
10 And here I have somebody who can potentially take my job,
11 because he works for the mother ship, so to speak, asking me
12 for like the secret recipe.

13 So I tell him, we'll talk about it. And then he
14 responds saying, OK, but can you just give me one of your
15 ideas. That's like, what -- if that's not personal
16 interference and, and threatening Major Energy's ability to hit
17 earnout, I don't know what is. I, I was stunned at how blatant
18 they would do that. And so, like the other e-mail, I thought
19 it was something super-concerning that Dan and Mark, my two
20 bosses, needed to know about, so I forwarded it on.

21 Q. OK. Mr. Wolbrom, you were asked some questions about
22 whether you quantify the return on investment with respect to
23 the sponsorship, those questions. Do you recall that?

24 A. Yes.

25 Q. In your opinion, did Major's sponsorship relationships with

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Wolbrom - Redirect

1 any of the sponsorships you had, MSG, the Knicks, or the
2 Yankees, create value for Major Energy?

3 A. Oh, absolutely. Absolutely, a hundred percent. We didn't
4 just buy a sponsorship deal. A lot of companies did that after
5 we did and flopped, because anybody can write a check to -- if
6 you have the money -- to a, you know, an entity that's willing
7 to take it. What we were so great at, my department was so
8 great at, my assets, my teammates, was taking that and then
9 making something of it. We didn't just have logos, you know,
10 on the corner of MSG, although we did. There was a reason for
11 that. Our commercial customers would come in and, or our
12 potential customers would come in, our brokers would come in;
13 they would see "Major Energy" in lights on the corner of the
14 world's most famous arena, and, yeah, they were very impressed.
15 We actually lit up the lights of Madison Square Garden. So
16 this was extremely impressive. We had a slew of hospitality
17 and experiential things that we did that really money can't
18 buy, although it did buy it. It wouldn't have happened if not
19 for myself and my team putting together trips on the Knicks
20 team plane, the Rangers plane. We went to London with clients.
21 I mean, we took the sponsorship and effectively became -- and I
22 think I had this in my testimony -- it truly became the nucleus
23 of what Major Energy did. This wasn't just Madison Square
24 Garden, the Knicks, and the New York Rangers. It was the New
25 York Yankees. It was our sponsorship deals. We were excellent

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Wolbrom - Redirect

1 at taking it and then shooting it out into all verticals of the
2 business, even the residential side of the business. You know,
3 it was -- did a customer -- we had hundreds of sales reps out
4 in the field selling door to door. It wasn't, you know, they
5 weren't just doing what everybody else does. No, they had the
6 Knicks logo and the Rangers logo and the Madison Square Garden
7 logo and the Yankees logo on their shirts knocking on doors --
8 you know, not that I just sort of opened the door. That goes
9 back to the flaw part. But if I'm looking for people and
10 somebody's knocking and I see, you know, the Knicks logo and
11 then "official energy supplier," that's credibility. That
12 makes us different than any other person who's going to come
13 after or who came before. It's built into telemarketing,
14 "Hi" -- and just as an example, "Hi, this is Elliott, I'm
15 calling from Major Energy, the official energy partner of the
16 New York Knicks, is Chelsea there." Every element of our
17 business, we took these sponsorships that we paid a lot of
18 money for and infused those -- we infused those channels and
19 those verticals with our sponsorship deal, whether it was
20 tickets, whether it was signage, whether it was IT rights,
21 whether it was, you know, just verbally discussing it, whether
22 it was having the ability to sit around the table with my
23 counterparts at Chase, at Delta, at Ikea, at Lexus, at
24 Enterprise and ETS, that made Major Energy different than any
25 other ESCO, whether they were bigger than us or smaller than

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Wolbrom - Redirect

1 us.

2 And quite frankly that's partially why Spark bought
3 us. One time I spoke with Nathan because he was here in our
4 office. That was literally the only thing he said to me: I
5 love the sponsorships you did. So I may not have had a number
6 in my testimony. I'm not an accountant. I'm the furthest
7 thing from it. but to say the sponsorship deal didn't make
8 Major Energy what it was, in every single element, would be a
9 total lie. It would have be absolutely different. That's what
10 made Major Energy, Major Energy. We were a brand. We weren't
11 just a supplier. Very few ESCOs are brands the way Coke -- I'm
12 not saying we were Coke. I wish. But that's what we did.
13 That was the goal, was to take boring energy, electricity, gas,
14 that has no tangible feel, and make it different than everybody
15 else. And that is why we were different. And our team made
16 that happen. All parts of our team.

17 And that is what got ruined when Spark interfered. It
18 would have been fine if they bought us and let us do our thing.
19 If I was Spark, I would have bought us too. Just let the
20 experts do what they do. They came in right away and
21 interfered with these things. And that's where we are today.

22 Q. Mr. Wolbrom, you were asked today about your relationship
23 with Mark Wiederman. Do you recall that?

24 A. Yes.

25 Q. How long have you and Mr. Wiederman known each other?

K35AHOR2ps

Wolbrom - Redirect

1 A. I believe I met Mr. Wiederman in 1999, or 2000. So 20
2 years.

3 Q. And how would you describe the relationship?

4 A. My relationship with Mark is great. I mean, I don't know
5 too many people -- I don't -- I don't have too many friends or
6 good relationships that are 20 years, you know, or more. We
7 had some ups and downs, if you want to call it, I would call it
8 a falling out, and that's just because we spent a whole lot of
9 time with each other. I don't know, I'll speak for myself, we
10 have that with our spouses, we have it with our kids, it
11 happens. You know, again, going back to the culture of Major
12 Energy before the sale, we spent a lot of time with one
13 another. We were in the office weekends, nights. You know, we
14 lived and breathed the brand. And so, you know, we may have
15 had some -- certain disagreements on things. That's super
16 healthy. If you don't have that, you're not human.

17 So my relationship was and is fantastic with him.
18 He's one of my closest friends and certainly the -- my favorite
19 person to work for, which is why I work for him now again.

20 Q. And, Mr. Wolbrom, you were asked about your relationship
21 with Dan Alper. Do you recall that?

22 A. Yes.

23 Q. Did you leave Major Energy because of Mr. Alper?

24 A. I think partially because of Mr. Alper. But the context
25 around that is, you know, super important. Dan Alper before

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Wolbrom - Redirect

1 the sale and Dan Alper after the sale were two different people
2 as far as any relationship with him. As I mentioned before, I
3 went out with him out of the office. We went to, I think,
4 Massachusetts once to have some team building one-on-one. I
5 spent a ton of time with him in his office discussing personal
6 growth and philosophy and things like that. I don't have that
7 with everybody, you know, certainly not somebody I wouldn't
8 like to open up like that. We had a really good relationship.

9 After the sale, it just became different. This was,
10 this is the result of the situation. You know, Dan, I can't
11 speak for him, but Dan is now reporting to a publicly traded
12 company with earnings and presumably getting a whole lot of
13 pressure to hit those earnings and to hit those quarterly
14 reports, again, things that are just not my, my lane. So Dan
15 became different. And, you know, I didn't leave Major Energy
16 in November or December or January of 2015 or January of 2016.
17 I was fine there. I, my -- I would still be there today, you
18 know, if nothing happened, I think.

19 My, my falling out, if you want to call it, it would
20 have more applied to Dan, was only after the sale. So that's
21 my relationship with him.

22 Q. I'd like to show you PX 225. Do you recall writing this
23 letter, Mr. Wolbrom?

24 A. Yes.

25 Q. And if we could, in the second paragraph, it says,

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Wolbrom - Redirect

1 "Although the ambition and drive to create and be a part of
2 something bigger than any one person existed four years ago, I
3 could not have scripted how I thought things would play out
4 back in 2012 on my first day. Always a victim -- for better or
5 for worse -- to personal reflection and sentimentality, when I
6 sit and think about this four-year journey, where I've been so
7 blessed to lead the marketing and sales for one of the most
8 well-run and rapidly-expanding energy companies in the country,
9 I am infused and overwhelmed with a plethora of humility and
10 gratefulness. It's 'only' four years but it feels as if it's
11 both yesterday and a lifetime ago all at the same time. It's
12 hard, often impossible, to remember what life before Major
13 Energy even looked like or felt like for me." Did I read that
14 right?

15 A. Oh, yes.

16 Q. And then if we could go on to page 2, Eric, the middle
17 paragraph. It says, "Here at Major Energy, we very much know
18 what we do and why we do it. We have always sought to break
19 the status quo and change the way people think about and
20 interact with their energy consumption and their energy
21 company. Creating great added value beyond the mundane, normal
22 gas and electricity proposition is in our DNA, and we've got
23 big plans and ideas in the pipeline to achieve and further
24 perpetuate those goals." Did I read that right?

25 A. Yes.

K35AHOR2ps

Wolbrom - Redirect

1 MS. COREY: Eric, could we just go back to the first
2 page.

3 Q. And at the top it says "published April 18, 2016." Do you
4 see that?

5 A. Yeah.

6 Q. So this is a few days after the sale of Major Energy to
7 NGE. Correct?

8 A. I don't remember the exact date, but it could -- it was
9 more -- this is my anniversary.

10 Q. Right.

11 A. That's why I wrote that.

12 Q. Of the four years of working at --

13 A. Of my first four years, yeah.

14 Q. So what prompted you to write this letter, Mr. Wolbrom?

15 A. I am a sentimental guy. I don't know how else to say it.
16 I worked -- I worked really, really hard at building Major
17 Energy. Like I said, hours and hours. It wasn't just me. It
18 was a fantastic team. But we really worked hard. Whether it
19 was marketing or branding, the sales, the crunching the
20 numbers, the weathering the storm, when there had been a polar
21 vortex, dealing with customer service, employees, I gave it my
22 all. And I, I, I knew it was a hard industry to, you know, to
23 operate in, just -- it's not like selling, you know, a
24 Mercedes. It's a difficult -- it's just a difficult industry.
25 And we worked our tail off.

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Wolbrom - Redirect

1 And I just felt, you know, I made all these great, you
2 know, relationships or, or -- personal relationships with
3 companies that -- for me to think that I'd ever be sitting --
4 you know, in 2016 I was 36, but even before that, to be sitting
5 at a conference table, at Madison Square Garden, with a CMO of
6 Chase, I mean, I'm nothing, who am I? And it's just like this
7 reflection of being able to take this little ESCO in New York
8 and, and make us, you know, at least to the public, this
9 massive company that's like cool almost, in the most uncool
10 industry ever, was just -- I don't know. I mean, I, you know,
11 I'm a marketing guy, and I don't know if I were an accountant I
12 would write this, but I am an emotional guy and this was -- I
13 started, I believe, April 15th or 16th 2012. And nobody told
14 me to write this. This is on my own personal LinkedIn. I just
15 felt -- I was just really, really feeling grateful. And then
16 I, I -- sometimes I show that in my writing. And this, this is
17 what I was, I mean, to be honest with you. This is, this is
18 something that I felt with sweat and tears literally.

19 And, you know, the sale happened. I know that that's
20 one of the goals in this industry. But I was told that it
21 wasn't going to change and it was just going to be opportunity
22 for us. More utilities maybe, more backing, more money. I
23 don't know what. But, you know, my, my, my hope was that this
24 was going to still be around. Maybe we have a brand. Maybe
25 I'm the CMO of Spark. I had no idea. But right here in this

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Wolbrom - Redirect

1 moment, it's just me and my computer and I'm, I'm grateful, I'm
2 grateful for the friends I made, my colleagues. So I wrote it.
3 I don't know. This was --

4 Q. And just to be clear, Dan Alper was the CEO of Major Energy
5 at this time.

6 A. Absolutely, for at least six months.

7 Q. And you left only six months later.

8 A. Yes.

9 (Continued on next page)

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K357HOR3

Wilbrom - recross

1 MS. COREY: I think we did PX166, PX184, PX193 and
2 PX225.

3 THE COURT: They are received. Thank you.

4 Is there recross?

5 MR. WILKERSON: If I may, a few questions.

6 THE COURT: How long, do you think?

7 MR. WILKERSON: Maybe five minutes I'm thinking, but
8 it depends on the answers obviously.

9 THE COURT: OK.

10 RECROSS EXAMINATION

11 BY MR. WILKERSON:

12 Q. Mr. Wilbrom, you were just asked by your counsel about some
13 troubling e-mails -- your words -- in the summer of 2016
14 regarding PTM. Do you recall those e-mails?

15 A. Can you just bring them up? If you're going to refer to
16 them, I would like to see them in front of me.

17 Q. It was Plaintiff's 166 and Plaintiff's 184. Do you recall
18 those e-mails, sir?

19 A. Yes.

20 Q. And do you recall discussing those e-mails with your
21 counsel a few minutes ago?

22 A. Yes.

23 Q. Are you aware that the money paid to PTM by Major Energy
24 increased in 2016 versus 2015?

25 A. I don't know the total dollar amount. I said that before.

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Wilbrom - recross

1 Q. And I may have asked you this before -- if so, I apologize.
2 When you left Major Energy in October 2016, PTM was still
3 actively marketing for Major Energy, right?

4 A. I'm going to answer the same way. I don't believe we
5 terminated the agreement. I don't remember -- I don't remember
6 exactly where they were or what they were doing. I believe
7 they were still marketing when I left.

8 Q. You also talked with your counsel about the sponsorship
9 deals again. Do you recall that?

10 A. Yes.

11 Q. And you said that the sponsorship deals definitely created
12 value for Major Energy, right?

13 A. Yes.

14 Q. We already saw in Major Energy's presentation the customer
15 count dropped after the sponsorships began in 2013, right?

16 A. I would need to see the figures again.

17 Q. Sure.

18 A. And just to add on to that, customers leaving would yield
19 what that net number is. If we weren't pouring in customers at
20 the rate he we were, those numbers would be significantly
21 worse, and mind you we went through a polar vortex which just
22 impacted every energy company.

23 So, looking at the net number of customers is not a
24 good indication of whether or not a sponsorship was working. I
25 would argue if we didn't have that, that number would be way,

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Wilbrom - recross

1 way, way lower. So, the bottom is opening up, the customers
2 are coming out, and if you're not pouring in at an equal rate
3 almost -- which we did via our sponsorships -- I'm saying that
4 looking at the net number is indicative of customers leaving
5 and customers going in.

6 Q. In the interests of time, I won't look back at the document
7 we looked at before; I will just ask you one last question.

8 As far as you know, Spark never terminated any of the
9 sponsorship deals during the earnout period, did it?

10 A. I don't know. I don't know what happened after I left.

11 Q. And when you left, they were still in place, those
12 sponsorship deals.

13 A. Yes, I believe so.

14 MR. WILKERSON: No further questions, your Honor.

15 THE COURT: All right. Anything further?

16 MS. COREY: Nothing.

17 THE COURT: OK, thank you. You may be seated, sir.
18 Thank you. We will take a ten minute break. Is ten minutes
19 long enough?

20 MR. DAHAN: Yes.

21 THE COURT: And you will be ready with the next
22 witness then?

23 MR. DAHAN: I believe so.

24 (Recess)

25 THE COURT: Ms. Becker?

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Josefovic - cross

1 MS. BECKER: Thank you, your Honor. The defendants
2 call Mark Josefovic.

3 THE COURT: All right. Good morning, sir. Please
4 come up to the witness stand and come up to the top step here.

5 MR. DAHAN: Your Honor, would it be all right if he
6 affirms?

7 THE COURT: Yes, just say affirm instead of swear.

8 MARK JOSEFOVIC,

9 called as a witness by the plaintiff,

10 having duly affirmed, testified as follows:

11 CROSS EXAMINATION

12 BY MS. BECKER:

13 Q. Good morning, Mr. Josefovic. You are one of the sellers of
14 Major Energy, correct?

15 A. Correct.

16 THE COURT: Is it M-A-R-K or C?

17 THE WITNESS: K.

18 Q. And you own approximately 20 percent of Major Energy both
19 individually and through your trusts?

20 A. Correct.

21 Q. Your initial investment in Major Energy was in the order of
22 350 to \$375,000?

23 A. Something to that effect.

24 Q. And following that initial investment, Mr. Josefovic, you
25 didn't make any subsequent investments into the business,

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Josefovic - cross

1 correct?

2 A. No.

3 Q. You were one of the nonmanagement silent sellers?

4 A. Correct.

5 Q. You along with Mr. Bauman and Mr. Fried?

6 A. Correct.

7 Q. Mr. Bauman was your business partner?

8 A. Is, yes.

9 THE COURT: Would you mind pulling the mic a little
10 closer and moving up, if you could.

11 THE WITNESS: Sure.

12 THE COURT: Thank you.

13 Q. Mr. Bauman is your business partner.

14 A. Yes.

15 Q. And Mr. Fried is somebody you have known since high school?

16 A. Correct.

17 Q. You were never involved in the operation of Major Energy,
18 right?

19 A. No.

20 Q. You just got involved in Major Energy for an investment.

21 A. Yes.

22 Q. And that's outside of your work in the healthcare industry?

23 A. Correct.

24 Q. You don't have firsthand knowledge of Major Energy's
25 operations prior to the sale to NGE; is that fair?

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Josefovic - cross

1 A. Yes.

2 Q. And you also don't have firsthand knowledge of Major
3 Energy's operations during the earnout period, fair?

4 A. Correct.

5 Q. You relied on Mr. Horowitz and Mr. Wiederman to keep you
6 apprised of Major Energy's business?

7 A. Yes.

8 Q. You weren't involved in negotiating the transactional
9 documents related to the sale of the membership interests in
10 Major Energy to NGE, were you?

11 A. No, not direct. I didn't have direct involvement, but I
12 obviously had conversations about it.

13 Q. And that was with Mr. Horowitz and Mr. Wiederman?

14 A. Correct.

15 Q. Based on your ownership percentage of Major Energy, you
16 received approximately 20 percent of the cash purchase price of
17 Major Energy?

18 A. Yes.

19 Q. And so that's roughly \$8 million?

20 A. Yes.

21 Q. Based on the \$9 million that Spark HoldCo has paid to
22 sellers in connection with the earnout in the form of
23 contingent payments, you received another roughly 1.8 million?

24 A. Yes.

25 Q. So in total you have received about \$9.8 million as of

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Josefovic - cross

1 today.

2 A. Yes.

3 Q. And you would expect, sir, if any additional monies were
4 paid to Major Energy in connection with this lawsuit, that you
5 would receive 20 percent of that amount?

6 A. Correct.

7 Q. During the 33 month earnout period following the sale of
8 Major Energy, you weren't involved in preparing the earnout
9 calculation, were you, sir?

10 A. No.

11 Q. From your perspective, a sale of Major Energy was always
12 the exit strategy for the sellers, right?

13 A. I don't know about the word always, but it was definitely a
14 consideration.

15 Q. You didn't care who bought Major Energy just as long as the
16 dollars and cents were acceptable to you?

17 A. Correct.

18 Q. You were aware that back in 2014 Major Energy was involved
19 in discussions with Spark Energy, Inc. about a potential
20 acquisition?

21 A. I recall the name at the time but nothing of real
22 relevance.

23 Q. Is it fair to say you weren't involved in those
24 negotiations then in 2014?

25 A. Correct.

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Josefovic - cross

1 Q. Major Energy's sellers were also involved in discussions
2 with an entity called Crius -- which is a public company --
3 sometime around the 2014, 2015 period?

4 A. Crius?

5 Q. Crius.

6 A. I remember the name.

7 THE COURT: How do you spell Crius?

8 THE WITNESS: I think it's Crius, C-r-i-u-s.

9 Q. Do you recall Major Energy was involved in some discussions
10 about a potential sale of the business to Crius?

11 A. I remember the name also. The same way I remember Spark at
12 the time, Crius was also a name.

13 Q. And you weren't involved directly in those negotiations?

14 A. No.

15 Q. OK. When Major Energy -- when the sellers ultimately sold
16 their membership interest in Major Energy to NGE, NGE's offer
17 was the best offer on the table at that time, right?

18 A. It was an offer that was acceptable based on the terms of
19 the agreement.

20 Q. And so it was the best offer on the table?

21 A. To my knowledge, at that time I don't know if there was any
22 other offer on the table.

23 Q. Fair enough. In mid-January 2016 you -- let me take a step
24 back. Mr. Josefovic, you are aware that the discussions
25 between NGE and Major Energy about a potential sale occurred in

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Josefovic - cross

1 the late 2015, early 2016 timeframe?

2 A. Yeah, I think we closed in the first quarter, beginning of
3 the second quarter of '16, so it probably started around that
4 time.

5 Q. And in mid-January 2016 you received from Mr. Horowitz a
6 LOI -- or a letter of intent -- from NGE to purchase the
7 sellers' membership interest in Major Energy?

8 A. I don't recall the exact date, but I am assuming at some
9 point we got an LOI.

10 Q. Why don't we pull up DX180, James.

11 And just to orient you to this document, Mr.
12 Josefovic --

13 why don't we go, if you could, James, to Bates No.
14 1196. That's the initial e-mail in this thread.

15 That's an e-mail from Dave Hennekes to Dan Alper at
16 Major Energy. Do you see that?

17 A. Yes.

18 Q. On January 14, 2016?

19 A. Yes.

20 Q. And the subject is "non-binding LOI".

21 A. OK.

22 Q. Do you understand LOI to be letter of intent?

23 A. Yes.

24 Q. OK. Mr. Hennekes writes to Mr. Alper, "Dan: We are
25 pleased to present this indication of interest for

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Josefovic - cross

1 consideration by the shareholders of Major Energy and its
2 affiliates. If acceptable, please sign and return to me."

3 Now, if we can take a step back, James, and there is
4 an attachment to this document at the next page, 1197. Can you
5 pull that up.

6 Mr. Josefovic, this January 14 letter has a subject
7 line "non-binding proposal to purchase equity of Major Energy
8 services." Do you see that?

9 A. Yes.

10 Q. Do you recall seeing this letter back in January of 2016?

11 A. No, I don't recall. My screen just shut off.

12 THE COURT: It will come back in a second.

13 A. But I don't recall.

14 Q. OK.

15 A. I got it.

16 Q. Great. James, if you could take a step back and just go to
17 the first paragraph of this letter, just to provide some
18 context.

19 Mr. Josefovic, the first line of this non-binding
20 proposal to purchase equity of Major Energy's services reads:
21 "National Gas & Electric is pleased to provide this nonbinding
22 indication of interest to Major Energy Services LLC. This
23 letter summarizes the principal terms of a proposal by NG&E or
24 one or more of its affiliates or subsidiaries regarding the
25 possible acquisition of all of the issued and outstanding

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Josefovic - cross

1 capital stock, membership interest or other ownership interest
2 in Major." And it continues.

3 Did I read that correctly?

4 A. Yes.

5 Q. OK. Now taking a step back, if we can go back to the
6 document, James.

7 This letter contains a number of paragraphs that have
8 key terms of the acquisition. Do you see that, Mr. Josefovic?

9 A. Yes.

10 Q. And you recall the initial offer from NGE to Major Energy.
11 Do you remember, for example, the purchase price?

12 A. I recall it being 60 million up front and I think it was 20
13 million in earnout.

14 Q. And when you say \$20 million in earnout, that's contingent
15 payments sometime that Major Energy -- that Major Energy could
16 earn sometime in the future after the sale?

17 A. Correct.

18 Q. OK. And why don't we take a look actually on the next page
19 or paragraph 1D. And paragraph 1D, there was a \$20 million
20 earnout contemplated over a two year period. Do you see that?

21 A. I see it now, yes.

22 Q. And do you recall, Mr. Josefovic, that there were certain
23 drivers of the earnout?

24 A. Yes. I don't recall what they were but yes.

25 Q. Well, taking a look at 1D that's before you, you see that

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Josefovic - cross

1 the adjusted EBITDA is a factor in the earnout?

2 A. Yes.

3 Q. And do you see that customer count is a factor in the
4 earnout?

5 A. Yes.

6 Q. So if we can go back to the e-mail, James.

7 So, Mr. Alper at the bottom of this first page of
8 DX180 forwards this non-binding LOI from NGE to Mr. Horowitz
9 and Mr. Wiederman, and you see that Mr. Horowitz in turn
10 forwards that along to you.

11 A. Yes.

12 Q. So on January 14 Mr. Horowitz shared this non-binding LOI
13 with all of the sellers of Major Energy, correct?

14 A. Yes.

15 Q. And in response to Mr. Horowitz's message, you responded
16 just to Mr. Fried, right?

17 A. Yes.

18 Q. And just for the record and for clarity, Ushy Fried, that's
19 Asher Fried?

20 A. Yes.

21 Q. OK. When you forwarded Mr. Horowitz's message to Mr.
22 Fried, you wrote, "The earnout is scary with our account
23 numbers dropping month over month:"

24 A. OK.

25 Q. Do you see that?

K357HOR3

Josefovic - cross

1 A. Yes.

2 Q. And as of mid-January 2016, a couple months before signing
3 the transactional documents on March 18, you thought that the
4 earnout component was scary because you already knew that Major
5 Energy's accounts were dropping month over month?

6 A. And between January 14th and April 18th I got comfortable
7 with the terms of the agreement.

8 Q. OK. But when you received this letter of intent, you were
9 concerned, and your first reaction to your childhood friend was
10 to express that you thought the earnout was scary given what
11 was going on with Major Energy's customer accounts.

12 A. I'm a passive investor, not involved in the day-to-day
13 operations of the company. I'm reading the terms of an
14 agreement and asking a question. I got comfortable with the
15 terms of the agreement and moved forward. I am not involved in
16 the company.

17 Q. So I'm clear, when you say you are asking a question, is
18 that your statement that the earnout is scary with our accounts
19 dropping month over month?

20 A. I said something based on what was going on at the time,
21 but obviously we were getting comfortable with the agreement,
22 and I believe in the first quarter of '16 our customer count
23 went up I think the largest it went up from the time we started
24 the company. So, I don't think it was an issue at the end of
25 the day.

K357HOR3

Josefovic - cross

1 Q. After the first sentence of your e-mail to Mr. Fried, you
2 continue "Because even if we kill with RCEs and overall profit,
3 the customer count can really hurt us." Do you see that?

4 A. OK.

5 Q. And the reason that the customer count could really hurt
6 you was because customer count was one of the two drivers of
7 the earnout, right?

8 A. Again, I'm a passive investor making a reaction to seeing
9 terms of an agreement, and then asking another party about the
10 terms of the agreement on something that might be a concern or
11 not a concern. It didn't play out to be a factor at all. At
12 the time I was asking a question. And, again, I am not
13 involved in the day-to-day operation of the company; I didn't
14 know if it was an issue or wouldn't be an issue.

15 THE COURT: You are sort of arguing with the lawyer.
16 You need to answer the question if you can, and the question
17 was: And the reason the customer count could really hurt us --
18 you -- was because the customer count was one of the two
19 drivers of the earnout, right?

20 THE WITNESS: Correct.

21 Q. James, you can take that down.

22 The terms of the sale of sellers' membership interest
23 to NGE evolved after that letter of intent that we saw that was
24 dated in January of 2016, right?

25 A. Again, I'm not sure what you're saying.

K357HOR3

Josefovic - cross

1 Q. Sure. The structure of the proposal by NGE to purchase the
2 sellers' membership interest in Major Energy, that changed
3 before the deal that was finally signed?

4 A. Yes.

5 Q. OK. And the aggregate purchase price, that did not change,
6 correct?

7 A. Correct.

8 Q. But the upfront cash purchase price did change.

9 A. Correct.

10 Q. That went from 60 to 45, correct?

11 A. Correct.

12 Q. And the contingent payment increased.

13 A. Correct.

14 Q. OK. And the earnout period also changed; it went from 24
15 months to 33 months. Do you recall that?

16 A. Yeah.

17 Q. You recall that the portion of the purchase price that
18 would be deferred in the form of contingent payments was changed
19 because of certain regulatory issues that affected NGE's
20 business?

21 A. I remember there was a proposal that came out from New York
22 State that caused concern from the buyer, thus the terms of the
23 agreement were changed, but to my understanding it did not
24 affect the outcome of NGE's business.

25 Q. You understand that a deal structure that includes a

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Josefovich - cross

1 contingent earnout portion of sales price is a mechanism for
2 the buyer and the seller to share risk?

3 A. Correct.

4 Q. Prior to the sale to NGE, sellers sought a valuation of the
5 different parts of Major Energy's business, in particular the
6 gas side of the business and the electric side of the business.
7 Do you recall that?

8 A. I recall, yes.

9 Q. OK. James, can you pull up DX250.

10 Some of the sellers' shares in Major Energy were more
11 heavily skewed to the electric side of the business; other
12 sellers' shares were more skewed towards gas?

13 A. Right.

14 Q. And so the purpose of getting a valuation was to understand
15 how the extra proceeds of any sale would be divided?

16 A. Correct.

17 Q. Actually if we can go to the next page of this document --
18 actually a little further down, if we could. Thank you.

19 So, on March 15th of 2016 you wrote, and then on the
20 next page you highlighted a few pieces of information that your
21 attorneys must review prior to closing. Do you see that?

22 A. Yes.

23 Q. And one of them was the allocation breakdown?

24 A. Yes.

25 Q. And that's this allocation between gas and electric that we

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Josefovic - cross

1 were discussing?

2 A. Correct.

3 Q. Now, if we go back to the e-mail, Mr. Alper -- and Mr.

4 Alper was the CEO of Major Energy?

5 A. Yes.

6 Q. And that was both before the sale to NGE and after?

7 A. I believe his title was CEO prior to the sale.

8 Q. And is it your understanding that he remained the CEO of

9 Major Energy after the sale to NGE?

10 A. I understood that he was still involved; I don't know for
11 how long. I understand he is not involved today.

12 Q. And you don't have an understanding whether he was

13 continued on as CEO?

14 A. I believe he did.

15 Q. The same day, March 15, Mr. Alper responds, and he provides
16 feed-back on a number of things. The first item is "Attached
17 is an allocation breakdown ..." Do you see that?

18 A. Yes.

19 Q. And that was the allocation breakdown as between the gas
20 side and the electric side of the business?

21 A. I believe so.

22 Q. OK. So why don't we go back to the e-mail. And you
23 respond -- you forward that along to Mr. Wiederman, right?

24 A. Yes.

25 Q. And you are copying Mr. Fried and Mr. Bauman?

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Josefovic - cross

1 A. Correct.

2 Q. And you say -- you write to Mr. Wiederman, "You're
3 satisfied with these valuations? I don't see how we don't
4 raise hell on this. I honestly believe we never structured gas
5 and electric properly all these years, and this is just
6 embarrassing. We can't accept this."

7 Do you see that?

8 A. Yes.

9 Q. And Mr. Wiederman in response, he agreed. He says, "I hate
10 it as much as you do. However, the numbers really do speak for
11 themselves. Especially now with New York potentially killing
12 the gas market completely. It's sickening."

13 Do you see that?

14 A. Yes.

15 Q. You were concerned about the allocation disproportionately
16 favoring the electric side of the business as opposed to the
17 gas side of the business?

18 A. Correct, because I owned a larger share on the gas side.

19 Q. Understood. So the allocation of gas and electric was
20 significant because it would dictate your share from the
21 proceeds of any sale?

22 A. Correct.

23 Q. And the concern about New York potentially killing the gas
24 market completely didn't give you much leverage to argue for a
25 larger allocation for the gas side of the business.

K357HOR3

Josefovic - cross

1 A. I don't recall the argument at the time, but again like I
2 said before we obviously got comfortable with how we allocated
3 and we moved forward. But at the time it was a conversation
4 based on how it would be allocated because it affected
5 adversely or negatively ultimately in the play-out.

6 Q. Sure. And so for somebody who holds a larger portion of
7 the gas side of the business than the electric side of the
8 business, a concern that the New York market would potentially
9 be killing the gas market completely would undermine your
10 ability to get a larger allocation, or would undermine your
11 ability to share in the bulk of the proceeds from the sale.

12 A. Again, those were words from Mark Wiederman about killing
13 the gas markets, so you would have to ask him exactly what he
14 meant by it, but ultimately, yeah, my concern was how are we
15 allocated the dollars and is the gas allocation getting the
16 proper value, because I owned a larger share on the gas side
17 than on the electric side.

18 Q. Beyond the effect of New York potentially killing the gas
19 market completely, beyond the impact on the allocations, you
20 would agree with me, sir, that if New York potentially killed
21 the gas market completely, that would negatively affect all of
22 Major Energy's gas business in New York.

23 MR. DAHAN: Objection. Calls for speculation,
24 especially for a person who says he was not even involved in
25 the industry.

K357HOR3

Josefovic - cross

1 THE COURT: Sustained.

2 If you want to rephrase it as his understanding, you
3 may.

4 Q. Mr. Josefovic, do you have an understanding that if there
5 was a concern about New York potentially killing the gas
6 market, that could affect Major Energy's business going
7 forward?

8 A. Again, I don't know what percentage exactly New York was.
9 We did service the New York area. There was a proposal on the
10 table, and that's why we were renegotiating the terms of the
11 agreement with the buyer. But again it didn't play out to have
12 any effect whatsoever. But the buyer felt comfortable to move
13 forward with their proposed regulations based on the new terms
14 of the agreement, and the seller decided to move forward as
15 well.

16 Q. Mr. Josefovic, New York was the market where Major Energy
17 was founded, right?

18 A. I believe so, but I really don't recall.

19 Q. Why don't we fast forward a few months later into July of
20 2016. This is after the sale of Major Energy to NGE.

21 A. OK.

22 Q. So that's about three months after closing mid-July of
23 2016?

24 A. Correct.

25 Q. So in July of 2016 you learned about another regulatory

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Josefovic - cross

1 risk that was developing in the New York market. Do you recall
2 that?

3 A. I don't.

4 Q. OK. Well, why don't we bring up DX349.

5 So if we take a look at the e-mail, at the bottom of
6 DX349 we have on July 18, 2016 Mr. Wiederman writing what looks
7 to be forwarding a news article titled "Update: New York ESCOs
8 must drop existing low-income customers to default service at
9 the end of contract term." July 18, 2016 is the date of the
10 story. Do you see that?

11 A. Yes.

12 Q. The first line of this article that Mr. Wiederman forwarded
13 reads, "The New York PSC has issued a written order imposing a
14 moratorium on ESCO service to low-income customers which
15 explains how treatment of existing low-income ESCO customers,
16 or ESCO customers who later become eligible for low-income
17 protections, are to be treated."

18 A. OK.

19 Q. Did you have an understanding that this order required
20 ESCOs like Major Energy to drop existing low-income customers?

21 A. I didn't have much of an understanding.

22 Q. OK. And so what you did when you received Mr. Wiederman's
23 e-mail was you asked a question. You asked Mr. Wiederman, "is
24 this a huge issue?"

25 A. Correct.

K357HOR3

Josefovic - cross

1 Q. And let's take a look at the response. So, Mr. Horowitz
2 responds to your question on July 18, and he says
3 "Potentially."

4 A. OK.

5 Q. You are aware, Mr. Wiederman, that the low-income --

6 A. Mr. Josefovic.

7 Q. I apologize, thank you. Mr. Josefovic, are you aware that
8 the low income order did eventually come to pass in New York
9 during the earnout period?

10 A. I have no clue.

11 Q. You don't know one way or the other.

12 A. No.

13 Q. We can take that document down.

14 During the earnout period, you periodically sought
15 updates about Major Energy's business from Mr. Horowitz and Mr.
16 Wiederman?

17 A. Most probably.

18 Q. And in June of 2017, did you understand that Mr. Wiederman
19 was in Texas meeting with Spark executives?

20 A. I don't recall.

21 Q. Well, why don't we take a look at DX494.

22 James, if you could go to page 8502. OK. If I can
23 focus you, James, on what is starting on June 9.

24 All right. So this is a WhatsApp thread between you
25 and Mr. Fried.

K357HOR3

Josefovic - cross

1 A. OK.

2 Q. You use WhatsApp?

3 A. Yes.

4 Q. And the name Mendy, that's you?

5 A. Yes.

6 Q. So the first WhatsApp exchange on June 9, 2017 is from you,
7 and it appears to be that you are attaching a JPEG file.

8 A. OK.

9 Q. And, James, if you could bring up DX494F.

10 OK. And this, I will represent -- this JPEG file I
11 will represent is the file that you sent to Mr. Fried at 2:56
12 on June 9, 2017.

13 A. If you say so.

14 Q. OK. And this is an exchange that you had with Mr.
15 Wiederman?

16 A. Yes.

17 Q. You asked first "Any Hatzlocha?"

18 A. Hatzlocha. It means good luck.

19 Q. Fair enough. Now, Mr. Wiederman responds to your question
20 about whether there was any luck in Texas by saying "LOL, no
21 silence. Basically we went through the 2017 and 2018. The
22 projections are somewhat ugly, primarily because we are taking
23 an 11 million cut for customer count."

24 Now, turning back to your WhatsApp exchange with Mr.
25 Fried, in response to your sending this JPEG file Mr. Fried

K357HOR3

Josefovic - cross

1 responds with an explicative, right?

2 A. Yes.

3 Q. OK. And he then continues at 3:37, "If we are losing 11
4 million from sale because of diminished customer count that
5 means we are losing 10's of thousands of accounts. We are
6 going to get into a spiral down situation by raising rates to
7 assure our earnout on earnings. Moshe doesn't care what I have
8 to say."

9 Now, he continues on. "He just 'I know and yes yes'
10 me. I honestly do not know how we can help the situation at
11 all without a creative way of bringing in significant
12 accounts." Then he continues and says "This is very bad."

13 Do you see that?

14 A. Yes.

15 Q. And you respond -- and if we can take a look at your -- why
16 don't we skip to the 3:41 message. At 3:41 you respond and you
17 are attaching an opus file. That's an audio file.

18 A. OK.

19 Q. I will represent that the audio file that's at DX494D is
20 what you sent to Mr. Fried at 3:41 p.m.

21 James, can you bring up 494D?

22 (Audio played)

23 Q. That was Mr. Wiederman's voice?

24 A. Yes.

25 Q. So as of June 2017 you understood from Mr. Wiederman that

K357HOR3

Josefovic - cross

1 customer count -- the thing that you had been concerned about a
2 year and a half ago -- was still an issue?

3 A. I believe it was some Spark regulations that they couldn't
4 do certain kinds of sales events, but I recall the whole thing.

5 Q. You understood from that audio file that Mr. Wiederman sent
6 you that customer count was an issue for Major Energy as of
7 June 2017.

8 A. Correct.

9 Q. And that was the same issue that you raised to Mr. Fried
10 prior to the sale to NGE. Do you recall that?

11 A. Yeah, but I don't believe one had to do with the other.

12 Q. OK. And in fact it was -- what Mr. Wiederman said was that
13 customer count was really, really hurting Major Energy.

14 A. OK.

15 Q. Why don't we go back to -- actually the next entry in this
16 WhatsApp exchange between you and Mr. Fried is you sending a
17 JPEG.

18 James, actually if we could take the next two JPEGs
19 that Mr. Josefovic sent to Mr. Fried. They are a continuation
20 of the same message.

21 I will represent to you they are DX494G and 494H.

22 Maybe if you could, James, put 494G up on the left and
23 494H on the right.

24 So, taking a look at what is on the right side of the
25 screen, there is a message that says, "Seriously that bad? But

K357HOR3

Josefovic - cross

1 if customer count is 11, how much more from EBITDA?" Mr.

2 Wiederman responds "A couple."

3 You respond, "Yikes. Any other escrow besides that 3
4 million?"

5 A. OK.

6 Q. And he says, "That's it."

7 Now, you respond, "Can we blame any of this on Spark?"

8 A. OK.

9 Q. And Mr. Wiederman's response to your suggestion or your
10 inquiry is, "We definitely can but it will be an uphill battle.
11 But it may be worth a shot."

12 A. Yes.

13 Q. And you ultimately agree that you thought it was a shot to
14 blame this on Spark.

15 A. It's definitely been an uphill battle the last few years
16 with expenses, which is what we were trying to avoid
17 ultimately -- by necessity.

18 Q. And you and Mr. Wiederman wanted to see if you could find a
19 way to blame this on Spark?

20 A. No, not find a way to blame this on Spark. Ultimately to
21 do what was right and coming to us and certain things that
22 Spark had done wrong to us.

23 Q. Now, in your text message to Mr. Wiederman, you didn't say
24 that in what has been marked as Defendant's Exhibit 494H. You
25 just said can we blame any of this on Spark?

K357HOR3

Josefovic - cross

1 A. I am sure that wasn't the end of the conversation. We
2 filed a lawsuit.

3 Q. It wasn't the end of the conversation, because Mr.
4 Wiederman responded, "We definitely can but it will be an
5 uphill battle."

6 A. OK.

7 Q. And you ultimately replied, "For a 13 to 15 million chop, I
8 think it would be worth a million in legal fees and try to
9 settle, especially if we have ground to stand on."

10 Do you see that?

11 A. Yes.

12 MS. BECKER: We pass the witness.

13 MR. DAHAN: Give me a moment, your Honor.

14 THE COURT: There is no witness statement for this
15 witness; is there?

16 MR. DAHAN: Correct.

17 THE COURT: Did you want to move in exhibits?

18 MS. BECKER: Yes, thank you. It's just DX180 and
19 DX494G. The others are already in.

20 THE COURT: They are received.

21 MS. BECKER: Thank you, your Honor.

22 (Defendant's Exhibits 180 and 494G received in
23 evidence)

24 THE COURT: Mr. Dahan, redirect?

25 MR. DAHAN: Just one second. I have no redirect, your

K357HOR3

Josefovic - cross

1 Honor.

2 THE COURT: OK. All right, sir, you may step down.

3 (Witness excused)

4 MR. DAHAN: Can we break for lunch now and start the
5 witness after? That witness will clearly carry over, so should
6 we break for lunch now?

7 THE COURT: I would rather start.

8 MR. DAHAN: That's OK.

9 THE COURT: We can take a brief break, five minutes.

10 MR. DAHAN: I underestimated some of the timing.

11 THE COURT: Your next one will be who?

12 MR. DAHAN: Amir Benisti.

13 THE COURT: All right. The reason is I have a lunch
14 at one o'clock, so I would like to take lunch from one to two
15 if possible, so if we could start. But we can take five
16 minutes.

17 MR. DAHAN: Thank you.

18 (Recess)

19 (Continued on next page)

K35AHOR4ps

Cross - Gibson

1 THE COURT: Mr. Hampton will swear you in. Please
2 raise your right hand.

3 LARRY TODD GIBSON,

4 called as a witness by the defendants,

5 having been duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. BROWN:

8 Q. Good morning, Mr. Gibson. Up in front of you you'll have a
9 couple binders, one of which contains the witness statements as
10 well as the exhibits, with the statements on top of that
11 binder. Do you recall submitting a witness statement in this
12 case sometime in December?

13 A. Yes. I see that.

14 Q. And do you recall preparing a statement, signing it, and
15 submitting it to the Court in this case?

16 A. Yes, I do.

17 Q. And you stand by everything you said in that witness
18 statement as of today?

19 A. I do.

20 MR. BROWN: Great. Go ahead.

21 MR. GABAY: Your Honor, just as a housekeeping matter,
22 we have objections we would like to hand up.

23 THE COURT: OK. Thank you.

24 CROSS-EXAMINATION

25 BY MR. GABAY:

K35AHOR4ps

Cross - Gibson

1 Q. Good afternoon, Mr. Gibson.

2 A. Good afternoon.

3 Q. You have worked for several companies owned by Keith
4 Maxwell since 1999, correct?

5 A. That's correct.

6 Q. And you are currently the CFO of NGE, right?

7 A. Yes, sir.

8 Q. You have served as CFO of NGE from 2015 through the
9 present, correct?

10 A. Yes.

11 Q. As CFO of NGE, one of your responsibilities has been to
12 sign contracts on behalf of NGE, right?

13 A. Yes.

14 Q. You're aware that NGE and the sellers entered into a
15 membership interest purchase agreement, or MIPA, dated March
16 18, 2016, right?

17 A. I don't remember the date exactly, but I do remember
18 entering into the agreement, yes.

19 Q. You were not involved in negotiating the MIPA with the
20 sellers, correct?

21 A. No.

22 Q. Just for clarity for the record, you were not involved?

23 A. No.

24 Q. You are also aware that NGE and the sellers entered into an
25 earnout agreement, correct?

K35AHOR4ps

Cross - Gibson

1 A. Yes.

2 Q. And you were also not involved in negotiating the terms of
3 the earnout agreement, correct?

4 A. No, I was not.

5 Q. Mr. Gibson, do you know who the CFO of Major Energy was in
6 2016?

7 A. I think it was David Sobel.

8 Q. Let's take a look at paragraph 48 of your witness statement
9 on the screen, please. There you state, "That same day, I
10 executed an omnibus assignment and assumption agreement on
11 behalf of NGE with both Spark HoldCo and Spark Energy Inc."
12 Correct?

13 A. I'm sorry. You lost me. What day are we talking about?

14 Q. Oh, I'm sorry. So this is on the day of the dropdown,
15 correct?

16 A. In, in August?

17 Q. August 2016.

18 A. OK.

19 Q. And here in your witness statement you say that you
20 executed an omnibus assignment and assumption agreement on
21 behalf of NGE with both Spark HoldCo and SEI, which is Spark
22 Energy Inc. Correct?

23 A. Yes, I did.

24 Q. You also executed that same omnibus assignment and
25 assumption agreement on behalf of Major Energy, correct?

K35AHOR4ps

Cross - Gibson

1 A. Yes, I did.

2 MR. GABAY: Eric, if we could please pull up PX 656.

3 Q. Sir, this is the omnibus assignment and assumption
4 agreement between NGE and Spark, correct?

5 A. This is just a portion of it. It's highlighted, and just
6 the first two paragraphs are here.

7 Q. We have a binder in front of you with the exhibits. If
8 you'd like to look at the full agreement, it's PX 656.

9 A. OK. I recognize it.

10 Q. OK. And if we turn to page 5, that's your signature for
11 NGE and the three Major Energy entities, correct?

12 A. Yes, it is.

13 Q. And underneath your signature for Major Energy, it says
14 that you were the CFO of Major Energy, correct?

15 A. Yes.

16 Q. Were you the CFO of Major Energy at this time?

17 A. This is after NGE -- I'm sorry. I'm not understanding the
18 question. This is in August?

19 Q. Correct.

20 A. Yes. Yes. I would have been as a subsidiary of NG&E.

21 Q. And when did you become the CFO of Major Energy?

22 A. It would have been upon our acquisition of Major Energy,
23 back in April.

24 Q. When you became the CFO of Major Energy, did you get a pay
25 increase?

K35AHOR4ps

Cross - Gibson

1 A. Did I get a pay increase? No.

2 Q. How much time did you spend being the CFO of Major Energy,
3 in comparison to the time you spent performing your role as CFO
4 of NGE?

5 A. Not as much time. Do you want to make that percentages
6 or --

7 Q. No. Is it fair to say it was significantly less time that
8 you spent on Major Energy business as opposed to NGE business?

9 A. Well, at that time, the bulk of National Gas & Electric was
10 Major Energy. So that -- we had just gone through the
11 acquisition, and so the majority of our business was Major and
12 its subsidiaries. So I would say less but, you know, it was
13 still -- it was still quite significant.

14 Q. And what did you do as the CFO of Major Energy?

15 A. We would monitor like balances, monitor their receipts and
16 collections, the receivable balances, typical stuff that I
17 would do as a chief financial officer.

18 Q. Now, when NGE acquired Major Energy in April 2016, Major
19 Energy's supplier was Pacific Summit Energy, or PSE, correct?

20 A. That's correct.

21 Q. In March 2016, PSE offered to extend the existing supply
22 relationship with Major through the end of the earnout period.
23 Correct?

24 A. I don't recall what they -- but they did offer to extend
25 it. I don't recall what they were offering to extend it

K35AHOR4ps

Cross - Gibson

1 through, but I think it was for like two years, through 2017.

2 MR. GABAY: Eric, if you could please pull up PX 374
3 and turn to page 2.

4 Q. Sir, this is a March 16, 2016 e-mail, from Mark Depew to
5 Mr. Wiederman and Mr. Alper, copying James Chung. Do you see
6 that?

7 A. Yes, I do.

8 Q. Mr. Depew and Mr. Chung were PSE employees at the time,
9 correct?

10 A. Yes.

11 Q. In the third paragraph of this e-mail, Mr. Depew writes,
12 "As you are aware, PSE would like to extend our existing supply
13 agreement with the Major entities, and it is our hope to, at a
14 minimum, support you through the entire earnout period with
15 NuDevCo." Do you see that?

16 A. Yes, I do.

17 Q. What is NuDevCo's relationship to NGE?

18 A. NuDevCo was the parent company.

19 Q. Mr. Depew continues, "Hence we would like to propose
20 extending our existing supply agreements through the end of the
21 earnout period, which would take us to around January 2019."
22 Correct?

23 A. OK. I don't recall that, but I -- I just recall when we
24 ultimately did extend it through. But I wasn't a party to this
25 e-mail, so I'm seeing it maybe for the first time.

K35AHOR4ps

Cross - Gibson

1 Q. If you would flip to page 1 just quickly, you'll see that
2 this was in fact forwarded to you and you were copied on this
3 e-mail, correct?

4 A. OK.

5 Q. Can we turn back to page 2, please. And looking back at
6 that paragraph we were just looking at, Mr. Depew continued,
7 "In order to make this a win-win for Major, PSE would be
8 willing to reduce our credit fee on the power sales from \$1 per
9 megawatt hour to 85 cents per megawatt hour effective upon
10 closing of your sale." Correct? Do you see that?

11 A. Yes, I see that.

12 Q. Now, if you flip to page 1, again you can see that
13 Mr. Hennekes added you to this e-mail chain on March 21, 2016,
14 right?

15 A. Yes.

16 Q. And in the third paragraph, Mr. Hennekes writes, "National
17 is building a brand across most deregulated markets as a
18 vehicle to acquire, operate, and de-risk other retail energy
19 brands and books of customers. We have a number of
20 transactions in the pipeline now, including Major, and we look
21 forward to continuing this relationship."

22 "This relationship," in the sentence I just read to
23 you, refers to PSE, correct?

24 A. I'm going to take a second to read the body of the e-mail
25 if that's fine?

K35AHOR4ps

Cross - Gibson

1 Q. Sure.

2 A. OK. I'm sorry. Would you repeat your question?

3 Q. The words "this relationship" in the sentence I just read
4 to you refers to PSE, correct?

5 A. I believe so. I believe it does, yes.

6 Q. And it's true that, at the time this e-mail was sent, NGE
7 had a number of transactions in the pipeline aside from Major,
8 correct?

9 A. I don't recall.

10 Q. Now, at the bottom of this e-mail, Mr. Hennekes writes, "I
11 have copied Todd Gibson, and he is available to meet with the
12 folks at PSE to talk further." Correct?

13 A. Yes.

14 Q. Now, despite this offer from PSE, which is for 85 cents per
15 megawatt hour, you still thought at the time that you could
16 force PSE's hand to no longer serve as Major Energy's supplier
17 by the end of the contract that Major had in place at the time
18 with PSE, correct?

19 MR. BROWN: Objection, argumentative.

20 THE COURT: Overruled. If you understand the question
21 you can answer.

22 A. Would you ask the question again, sir?

23 Q. Yes. Despite this offer from PSE for 85 cents per megawatt
24 hour, you still thought at the time that you could force PSE's
25 hand to no longer serve as Major's supplier by the end of the

K35AHOR4ps

Cross - Gibson

1 contract Major had with PSE at the time for supply, correct?

2 MR. BROWN: Objection, mischaracterization of document
3 and argumentative.

4 THE COURT: Overruled.

5 A. I wouldn't phrase this being able to force their hand. I
6 think we were just trying to lower their gas and electricity
7 purchase costs through a more an affiliated arrangement with
8 our sister company, Spark Energy.

9 MR. GABAY: If we could please pull up PX 3. We can
10 start at page 2.

11 THE COURT: You said PX 3?

12 MR. GABAY: 380.

13 Q. You can see, Mr. Gibson, this is the same March 16th e-mail
14 that we were looking at earlier, correct?

15 A. Yes.

16 Q. Again, Mr. Depew is offering 85 cents per megawatt hour in
17 this e-mail?

18 A. OK. I see that, yes.

19 Q. And if we flip to page 1, Mr. Hennekes forwards this e-mail
20 chain to you the next day, correct?

21 A. OK. Yes.

22 Q. And Mr. Hennekes copies Mr. Maxwell, right?

23 A. Yes. I see that.

24 Q. And who Mr. Maxwell?

25 A. He is the CEO of National Gas & Electric.

K35AHOR4ps

Cross - Gibson

1 Q. And did he have a position at Spark as well?

2 A. I think he was chairman -- he's chairman of the board.

3 Q. Mr. Hennekes writes, "Todd, per our conversation re Pac
4 Summit." Do you see that?

5 A. Yes.

6 Q. Further down, Mr. Hennekes states, "Seems like their offer
7 is about as cheap as any credit sleeve we have seen, so it
8 might be worth a breakeven analysis (recognizing the inherent
9 problem with having two liens on a dropdown)." Did I read that
10 correctly?

11 A. Yes. I see that. Yes. That reads correctly.

12 Q. And he then says, "As we discussed, we still think we can
13 force their hand, but want to make sure we shouldn't entertain
14 this or some counter." Did I read that correctly?

15 A. Yes.

16 Q. And Mr. Hennekes is describing a discussion he had with
17 you, correct?

18 A. I don't recall that discussion. I mean, I see that's what
19 he says, but today I don't recall that discussion.

20 Q. You don't see any Major Energy employees included on this
21 March 17th e-mail from Mr. Hennekes, do you?

22 A. Not on the document in front of me, no.

23 Q. The MIPA between the sellers and NGE was signed the next
24 day, correct?

25 A. Can I -- can I look at the documents?

K35AHOR4ps

Cross - Gibson

1 Q. Yes.

2 A. OK. I don't recall them.

3 Q. You can look at paragraph 24 of your witness statement just
4 to orient you.

5 A. OK. I see that, yes.

6 Q. And on April 15, 2016, NGE closed the deal with the
7 sellers, correct? You can see that in the next paragraph down.

8 A. Yes. Yes.

9 MR. GABAY: Eric, let's pull up PX 376.

10 Q. Now, this is almost a week later, on April 21, 2016.
11 Correct?

12 A. Yes.

13 Q. And Mr. Hennekes states, "Todd, if you have a few minutes,
14 can you please call to discuss the plans for the Pac Summit
15 situation at dropdown?" Correct?

16 A. Yes.

17 Q. And there were no Major Energy employees included on this
18 e-mail from Mr. Hennekes, were there?

19 A. I don't see any, no.

20 Q. Let's take a look at PX 680. This is also dated April 21,
21 2016, correct?

22 A. Yes.

23 Q. And Mr. Maxwell sends this message to you, Mr. Konikowski,
24 and Mr. Hennekes, correct?

25 A. Yes.

K35AHOR4ps

Cross - Gibson

1 Q. Mr. Maxwell writes, "Hey, what is the latest on PSE
2 termination timing," with two question marks. Correct?

3 A. Yes.

4 Q. And there were also no Major Energy employees included on
5 this e-mail from Mr. Maxwell, correct?

6 A. No.

7 Q. Let's pull up PX 361. This is an e-mail from Mr. Hennekes
8 to you dated April 29, 2016, with the subject line "PSE,"
9 right?

10 A. Yes.

11 Q. Mr. Hennekes writes, "Todd, just confirming I spoke with
12 Dan Alper and let him know about the termination notice and
13 asked him to communicate to Mark and Saul." You don't discuss
14 this April 29th e-mail in your witness statement, do you, sir?

15 A. I'm sorry. What was your question?

16 Q. You don't discuss this April 29th e-mail in your witness
17 statement, do you?

18 A. I don't recall.

19 Q. Feel free, sir, to open up your witness statement and just
20 turn to the PSE section, which begins on page 11, paragraph 49.
21 Just take a moment. Do you see any reference in your witness
22 statement to this e-mail?

23 A. No. I don't see a reference to this e-mail.

24 Q. Now, around the time of this e-mail, you called PSE to
25 discuss terminating the PSE relationship. Correct?

K35AHOR4ps

Cross - Gibson

1 A. I may have visited them in person. It was either a call or
2 an in-person visit where I went to their office.

3 Q. Do you recall actually calling them as well before
4 visiting?

5 A. Yes.

6 Q. And there were no Major Energy employees on that phone
7 call, were there?

8 A. On the call?

9 Q. Correct.

10 A. I don't think there were.

11 Q. And when you went down to visit PSE, who did you meet with?

12 A. I'm sorry?

13 Q. Which PSE employees did you meet with?

14 A. I met with Mark Depew and James Chung.

15 Q. And were there any Major Energy employees at that meeting?

16 A. I don't think so, no.

17 MR. GABAY: Your Honor, we'll pass the witness.

18 MR. DAHAN: One second.

19 MR. GABAY: Sorry, just a couple more questions.

20 MR. BROWN: No takebacks, your Honor.

21 MR. GABAY: My apologies.

22 THE COURT: No problem.

23 BY MR. GABAY:

24 Q. We will just quickly showed you one document.

25 MR. GABAY: I'm being told we'll pass the witness. My

K35AHOR4ps

Gibson - Redirect

1 apologies.

2 MR. BROWN: No takebacks, your Honor.

3 THE COURT: Do you want to move any of those documents
4 or are they already in?

5 MR. GABAY: Yes. Thank you.

6 The first one is PX 656. PX 374, PX 380, PX 376, PX
7 680, and PX 361.

8 THE COURT: They are received. Thank you.

9 (Plaintiff's Exhibits 656, 374, 380, 376, 680, and 361
10 received in evidence)

11 THE COURT: Redirect, Mr. Brown.

12 MR. BROWN: Thank you, your Honor.

13 I'll try to be quick, your Honor, in light of the
14 lunch hour coming up.

15 REDIRECT EXAMINATION

16 BY MR. BROWN:

17 Q. Mr. Gibson, let me just see if I can clean up the record on
18 one issue right out of the gate.

19 MR. BROWN: Can we pull up DX 263.

20 Q. DX 263, Mr. Gibson, do you see, is an e-mail at the top
21 from Mr. Wiederman to several folks on the date of closing of
22 the transaction between NGE and the sellers?

23 A. Yes, I see it.

24 Q. And do you see that you're copied in the cc line, second
25 line?

K35AHOR4ps

Gibson - Redirect

1 A. Yes.

2 Q. Along with Mr. Horowitz, Mr. Alper, various other folks,
3 including deal counsel at sellers.

4 A. Yes, I see that.

5 Q. And it says, "Gentleman, please see attached executed docs.
6 Thanks again for all the effort that was put in. Have a great
7 weekend. Mark." See that?

8 A. Yes, I do.

9 Q. And if you read down -- keep the whole first page on the
10 screen. Mr. Lancaster in the e-mail that gets forwarded is
11 forwarding various documents. And if we look down at the
12 second paragraph, it says, "Attached please find a guaranty
13 executed by Todd for all three entities that includes the
14 executive earnout agreement with Larry's changes." Do you see
15 that?

16 A. Yes, I do.

17 Q. And if we turn to the document that is half a page, line
18 660. James is ahead of me. Good job.

19 That's the guaranty that was signed. Do you see that?

20 A. I do see that, yes.

21 Q. And if we move over to the signature page, page 6, we'll
22 see that you signed this guaranty on behalf of the three LLCs
23 Major Energy entities that are being sold to NGE in connection
24 with the transaction. Do you see that?

25 A. Yes, I do.

K35AHOR4ps

Gibson - Redirect

1 Q. And then Mr. Horowitz signs at the bottom after you sign on
2 behalf of those three Major Energy LLCs. You see that?

3 A. Yes, I do.

4 Q. And as we continue to the next page -- that would be the
5 next attachment that's forwarded in this thread -- you
6 recognize that this is one of the three LLC written consents
7 that needed to be signed in connection with the closing of the
8 transaction?

9 MR. BROWN: James, just leave up the whole picture of
10 it on the screen.

11 Q. And it's also, Mr. Gibson, I believe --

12 MR. BROWN: Is it in the binder?

13 OK. Just keep the big screen up.

14 Q. You see this is page 1 of a written consent of managing
15 members of Major Energy electric services LLC?

16 A. Yes.

17 Q. And you recall there was one to be signed for each of the
18 three LLCs that were being acquired by NGE?

19 A. Yes.

20 Q. If we turn to the signature page of this first one, before
21 we have the signature page, this written consent, on the day of
22 closing, identifies various positions that are going to be
23 appointed for various individuals in connection with the
24 closing of the sale of Major Energy, correct?

25 A. Yes.

K35AHOR4ps

Gibson - Redirect

1 MR. BROWN: Your Honor, I know that I'm leading. I'm
2 doing it just for time.

3 Q. You see Mr. Alper is identified as the CEO at the closing?

4 A. Yes.

5 Q. And who is identified as the chairman of Major Energy's
6 first LLC as of the date of the closing?

7 A. The chairman?

8 Q. Yes.

9 A. Is W. Keith Maxwell III.

10 Q. And that's Mr. Maxwell we've been talking about?

11 A. Yes.

12 Q. And then you were appointed as of the day of closing as
13 executive vice president and treasurer, not CEO, executive vice
14 president and treasurer. Do you see that?

15 A. Yes, I do.

16 Q. And Mr. Gabay asked you certain questions on cross where he
17 showed that you had your title listed in the document as
18 executive vice president and CFO. Do you recall those
19 questions?

20 A. Yes, I recall the questions.

21 Q. Does this refresh your recollection that you were in fact
22 the treasurer of the Major Energy entities, not CFO?

23 A. OK. Yes.

24 Q. And you were executive vice president and CFO for lots of
25 other related Spark family of company entities; is that fair?

K35AHOR4ps

Gibson - Redirect

1 A. Yes.

2 Q. And that was your ordinary signature line and title; is
3 that fair? For those entities?

4 A. Yes.

5 Q. Looking back at at least this first document --

6 MR. BROWN: James, let's go to the signature page to
7 see who signed this document.

8 Q. So the managing members who sign this to appoint you as
9 executive vice president and treasurer as of the closing were
10 Mr. Horowitz and Mr. Wiederman as managing members, as well as
11 Mr. Horowitz as a seller representative. Correct?

12 A. Yes, I see that.

13 Q. And I won't belabor the point; in this document are serial
14 consents for the two other LLCs appointing you as executive
15 vice president and treasurer for each of those three entities,
16 which Mr. Horowitz and Mr. Wiederman signed off on. Do you
17 generally recall that, sir, from the time of closing?

18 A. Yes.

19 Q. All right. Let's put that aside.

20 Mr. Gabay showed you a couple documents with respect
21 to your communications with PSE both prior to the closing of
22 the transaction with NGE and after the closing. Do you recall
23 that? Do you recall those questions generally that Mr. Gabay
24 asked you?

25 A. Yes.

K35AHOR4ps

Gibson - Redirect

1 Q. You address those communications that you were having in
2 your witness statement at paragraphs 54 through 57. Is that
3 right? Is that where you summarize it?

4 A. In my witness -- you mean fifty --

5 Q. Paragraph 54 on page 13. You talk about the communications
6 in connection with PSE on March 22nd?

7 A. Yes.

8 Q. Let's pull up, you can turn to your binder if you like or
9 look at it on the screen, it's DX 995.

10 And so at the top of the first page of this thread,
11 this is another version of one of the e-mail communications
12 with a different trial exhibit number that Mr. Gabay was asking
13 you about, and it's the communication thread across March 21st
14 and 22nd pre closing about communications with PSE. Do you see
15 that?

16 A. Yes.

17 Q. And there are a variety of Major Energy folks on this pre-
18 closing document, right, Mr. Horowitz, Mr. Wiederman?

19 A. Yes.

20 Q. And as Mr. Alper is communicating to the group in that
21 e-mail at 2:55 a.m. -- I don't know what time zone that was --
22 he says, he says to the group, "Our view is that every month
23 that PSE continues to serve Major will benefit PSE and that
24 keeping them focused on the positive aspects of a continued
25 relationship, which may be through the end of the existing

K35AHOR4ps

1 contract, will hopefully bring PSE around to signing off
2 peacefully." Do you see that?

3 A. Yes, I do.

4 Q. When you received this at the time, did you have an
5 understanding that what Mr. Alper was referring to when he said
6 "which may be through the end of the existing contract," that
7 he was referring to the March 2017 expiration of the existing
8 three-year contract between Major Energy and PSE?

9 A. Yes.

10 MR. BROWN: I have nothing further, your Honor.

11 THE COURT: All right. Is there any recross,
12 Mr. Gabay?

13 MR. GABAY: Your Honor, no.

14 THE COURT: OK. Thank you.

15 Sir, you may step down.

16 (Witness excused)

17 THE COURT: Did you need to move either of those
18 exhibits in or no?

19 MR. BROWN: Just DX 263, your Honor.

20 THE COURT: DX 263 received.

21 MR. BROWN: Oh, I'm sorry. And one more. And DX 995.

22 THE COURT: And DX 995 is received.

23 (Defendant's Exhibits 263 and 995 received in
24 evidence)

25 THE COURT: All right. We'll break for lunch until 2

K35AHOR4ps

o'clock?

MR. BROWN: Thank you, your Honor.

THE COURT: All right. Thank you.

(Luncheon recess)

(Continued on next page)

K357HOR5

Benisti - direct

A F T E R N O O N S E S S I O N

2:00 p.m.

THE COURT: Good afternoon, folks.

Mr. Dahan?

MR. DAHAN: Thank you, your Honor. Plaintiffs call
Amir Benisti to the stand.

THE COURT: Sir, if you would please come on up, Mr.
Benisti.

AMIR BENISTI,

called as a witness by the plaintiff,

having been duly sworn, testified as follows:

MR. DAHAN: Your Honor, we're just going to hand out
the binders.

THE COURT: OK.

MR. DAHAN: Just to remind the Court, there is no
written direct for this one.

DIRECT EXAMINATION

BY MR. DAHAN:

Q. Good afternoon, Mr. Benisti.

A. Good afternoon.

Q. Thank you for coming to court today. I know it's your
wedding anniversary, and I'm sure you have plenty of other
places you would rather be, and we'll try to get you in and out
soon.

A. Thank you.

K357HOR5

Benisti - direct

1 Q. Were you employed at Major Energy?

2 A. Yes.

3 Q. When did you start working at Major Energy?

4 A. May of 2012.

5 Q. Are you still presently working at Major Energy?

6 A. No.

7 Q. When did you leave Major Energy?

8 A. I left in December of 2019.

9 Q. So a couple months ago?

10 A. Yeah.

11 Q. Were you fired?

12 A. No.

13 Q. You left on your own choice?

14 A. Yes.

15 Q. So you worked at Major Energy for about seven years; is
16 that correct?

17 A. Yes, seven and a half.

18 Q. I want to focus on the 2015 to the 2019 period. What was
19 your position at Major Energy?

20 A. It was director of business development.

21 Q. And what did that job entail being director of business
22 development?

23 A. It was in the broker network and bringing in commercial and
24 a little bit of residential brokers into the mix of the
25 network, and entertaining them and making sure that they --

K357HOR5

Benisti - direct

1 trying to get them to bring business through Major Energy.

2 Q. You mentioned a broker network. Did you primarily work on
3 the broker network side of the business?

4 A. Yes.

5 Q. And you mentioned two components. You mentioned
6 residential and commercial. Does the broker network have both?

7 A. We focused mostly on commercial, and we did have some
8 residential brokers as well. They were different than
9 marketers; they don't get paid up front. They get paid the
10 same way a commercial broker would get paid.

11 Q. So are you referring to they would not be through customer
12 acquisition costs or --

13 A. Correct.

14 Q. And can you quantify what percentage might be in the broker
15 network that's commercial and what portion would be the
16 residential?

17 A. I don't know exactly, but probably 25 percent residential,
18 I would say. Again, these are also residential deals that came
19 in not like one by one; there were a large amount of
20 residential.

21 Q. Who did you report to during that period of time?

22 A. Mostly Levi Moeller. Maybe at time it could have come up
23 to eventually reporting to Mark Wiederman.

24 Q. And when Mr. Moeller letter left sometime in I believe it
25 was end of '18, who did you report to?

K357HOR5

Benisti - direct

1 A. I reported to Mark Wiederman.

2 Q. And after Mr. Wiederman left in April or March of 2019,
3 until you left, who did you report to?

4 A. I think it was Nathan Kroeker may have told me that he was
5 going to be there more often, I may have been reporting to him.
6 It wasn't very clear, and then eventually it turned to a
7 hundred percent.

8 Q. After you first started in the broker department, can you
9 give me a sense of the size of that department or how many
10 people were in it.

11 A. Sure. When I first started in the broker department it was
12 Bruce Shipper who was in the department, and I was the second
13 person in that department.

14 Q. And what was Bruce Shipper's title or role at that point?

15 A. I believe he was director of broker network or something.
16 Director of broker network I believe it was.

17 Q. OK. And moving forward to let's say the 2016-2017 period,
18 did that grow? Was it still just you and Bruce?

19 A. No, we grew. We had brought some people from within, from
20 customer service, brought them up. One of them had
21 specifically had stayed up until the end of -- towards the end
22 of 2019. But we had brought other people into the department.
23 The department was growing year over year.

24 Q. Can you briefly describe to the Court sort of how the
25 broker division or network of Major Energy would go out and try

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Benisti - direct

1 to grow that division and get customers.

2 A. Sure. So, in the broker network and in this industry, in
3 the commercial space it's standard for energy brokers to have
4 the relationship in most cases with the customer and then we
5 would go out there and we would build the relationship with the
6 broker, get him to bring us the business to the supplier. And
7 at the end of the day it was very much dependent on what the
8 broker wanted to do, so a lot of it depended on price, and a
9 lot of it depended on trust. There was a big trust factor, and
10 at the end of the day we were enrolling his customer, and he
11 wanted to make sure that everything we were doing was correct
12 and also that we're paying a commission on time and all that
13 kind of stuff, so it was a big trust relationship that was
14 there as well.

15 Q. Now, you've heard the phrase RFP?

16 A. Yes.

17 Q. Can you explain to the Court what that is and how that
18 relates to the broker division.

19 A. Sure. An RFP is a request for price, so the brokers would
20 send out like an e-mail to us, Major, saying this is the
21 account, here are some bills, not bills, just account numbers,
22 whatever it was, but whatever we would need in order to cost
23 and price the account, and that was the RFP process, and
24 typically it would take two or three days to turn around the
25 price to the broker, and at that point the broker would go and,

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Benisti - direct

1 you know, sell it to the customer.

2 Q. Thank you. Now, around the 2015 time, how many RFPs would
3 the broker department at Major Energy handle on an average day?

4 A. I would say we were pricing anywhere between 30 and 40
5 accounts a day -- or different RFPs per day.

6 Q. And in 2016 that number was it higher or lower?

7 A. I would say it continued going up.

8 Q. OK. Now, was there a time that you recall Major Energy
9 became focused on growing their commercial business?

10 A. Yes.

11 Q. And to the best of your recollection, when do you think
12 that began?

13 A. I would say around 2014, maybe the beginning of 2014.

14 Q. What do you recall about that effort of Major Energy to
15 grow the commercial business?

16 A. We had just gotten into some one or maybe multiple states.
17 Mark Wiederman and Saul Horowitz -- maybe it wasn't Saul; maybe
18 it was Elliott Wolbrom -- but they had called us into the
19 conference room -- I believe it was just Bruce Shipper and
20 myself -- and they put a lot of emphasis on wanting to grow the
21 commercial department. He had told us, you know, we should go
22 out to Massachusetts or the specific state that we were
23 referring to, that he wants us to go out there and bring on
24 brokers, meet them face to face, build that relationship with
25 them, build that trust factor with them and start growing in

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Benisti - direct

1 that space.

2 Q. Again, that was around the 2014 period?

3 A. I believe so.

4 Q. OK. I want to show a document. If we could pull up
5 Plaintiff's Exhibit 414.

6 Now, it will come up on the screen but there is also a
7 book next to you, tabs, or you will see there is one 414 if
8 that's easier to look at. It's your choice.

9 THE COURT: Do you have the binder or not? You're
10 welcome to use the screen, but if you want to look at the
11 paper, it's in the binder.

12 Q. Why don't we turn to 30 of this document. So that would be
13 for you, Mr. Benisti, that would be the slide -- well, we will
14 have the 30 on the bottom, or you can look at slide 29.

15 A. OK.

16 Q. So, this is from a November 2014 Major Energy management
17 presentation, and this slide talks about agent sales, and it
18 says Major works with 182 agents/brokers. Do you see that?

19 A. Yes.

20 Q. And it says 115 of these have brought in accounts in 2014.

21 And you were in the broker department during that time
22 period?

23 A. Yes.

24 Q. And does that look consistent with your recollection of
25 about how many agents and brokers Major Energy had at the time?

K357HOR5

Benisti - direct

1 A. Yes.

2 Q. And then it says the total RCEs acquired in 2014 is 25,204
3 through September 2014. Do you see that?

4 A. Yes.

5 Q. Does that seem consistent with your recollection?

6 A. Yes.

7 Q. And the third bullet says 65 percent of sales are to
8 commercial accounts. Do you see that?

9 A. Yes.

10 Q. OK. Can you just -- there is -- on the first bullet it
11 says averaging 2800 RCEs per month. Maybe if you could from
12 the commercial perspective -- we have heard some on the
13 residential perspective -- can you explain the difference
14 between an account and an RCE.

15 A. OK. An RCE is what the industry would refer to as like the
16 equivalent to a standard home. So where one RCE would let's
17 say be an average of 10,000 kilowatt hours, one commercial
18 account, let's say a 1 million kilowatt hours for a commercial
19 account could mean 1,000 RCEs, so one commercial account can
20 easily pick up let's say 1,000 RCEs.

21 Q. So if I understand your testimony -- and if I'm incorrect,
22 let me know -- you could have something listed as one account
23 on the commercial end but it's producing the equivalent of
24 1,000 RCEs?

25 A. Yes.

K357HOR5

Benisti - direct

1 THE COURT: A commercial account is, for example, one
2 home that's getting the energy.

3 THE WITNESS: Correct. So a commercial account could
4 be let's say this building.

5 THE COURT: A commercial. I was thinking residential.
6 But a commercial account would be like a company.

7 THE WITNESS: Yeah, exactly. Like an office building
8 could have one meter, that's one account number, but it's
9 equivalent to let's say 1,000 homes.

10 Q. So I want to pull up now another document. And maybe we
11 could, Eric, move this to the side so we can do a comparison.

12 OK. Let's pull up PX359. And if we go to the next
13 page. So this now is a January 2016 presentation. OK? And if
14 we could go to I think it's 32, Eric.

15 Similar type of page. So we are now, you know, at the
16 beginning of 2016. So, from your recollection you talked
17 earlier before about the effort sometime in 2014 to grow the
18 commercial business. Before we discuss this slide, did you get
19 a sense that those efforts were paying off and the commercial
20 business was growing at Major Energy?

21 A. Yes, very much.

22 Q. So in the prior slide it talked about 182 agents, and 115
23 of them bringing in accounts in 2014. Do you see that?

24 A. Yes.

25 Q. The first bullet says 215 agents brought in accounts in

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1 2015 year to date. Do you see that?

2 A. Yes.

3 Q. That's about 100 more agents?

4 A. Yep.

5 Q. And it says largely relationship driven. Do you see that?

6 A. Yes.

7 Q. And no upfront acquisition cost - paid commissions during
8 period of service. Do you see that?

9 A. Yes.

10 Q. Then it says at this point in time total of 71,560 RCEs
11 acquired in 2015. Do you see that?

12 A. Yes.

13 Q. OK. And before we saw averaging 2800 RCEs per month, and
14 this one is saying representing 5,963 RCEs per month. Do you
15 see that?

16 A. Yes.

17 Q. Is this consistent with your recollection of the growth at
18 this point between '14 and '15?

19 A. Yes.

20 Q. You talked earlier before about relationships -- the
21 importance of relationships in the broker division and growing
22 the broker division. Can you describe what things Major Energy
23 did to try to establish relationships with the brokers?

24 A. Sorry. Can you repeat the question?

25 Q. Sure. Can you describe what types of things Major Energy

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1 did to develop -- establish the relationship with the brokers.

2 A. Yeah. So Major was very much relationship driven. We
3 always put the broker first. And one of the ways -- there were
4 multiple different things we have done, but one of them was
5 let's say, you know, always making sure that we got back to
6 them on time, we turned things around, we had answers for them,
7 we got things done for their customer. Because again they're
8 giving us their customer technically, and they want to make
9 sure that we're handling their customer, you know, properly --
10 and even more than properly, making sure that their customers
11 are handled the best, because that's their name on the line.
12 So, we always make sure that everything -- all our processes
13 run quick and smoothly.

14 We would take them out, show appreciation. There was
15 a huge trust factor that we always tried to get with every
16 single one of our brokers. We would take them out for dinners
17 and even go above and beyond just to show that we really care
18 for them.

19 We had sponsorships that we would be able to take them
20 to games and sometimes let their families go, or let people in
21 their brokerage -- you know, if it's a bigger brokerage and we
22 wanted to send employees, we were very into -- you know, it's
23 all about them.

24 Q. So is it fair to say the game plan -- to use that
25 analogy -- was to get the business, right?

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1 A. Yes.

2 Q. You mentioned sponsorships. Do you recall what
3 sponsorships Major Energy had at the time?

4 A. Yeah, it started with I believe MSG and Knicks, and Rangers
5 and Yankees.

6 Q. And did you from your experience feel that the sponsorships
7 assisted in developing and growing the commercial business?

8 A. Yes, because it really gave us a lot of credibility in the
9 market that some people don't have.

10 Q. Now, you mentioned I think before -- strike that.

11 Now, are there different types of -- or volumes of --
12 commercial deals?

13 A. Yes.

14 Q. Can you briefly describe that to the Court.

15 A. Sure. So there would be, let's say, larger deals -- well,
16 let's start with a smaller deal.

17 A small commercial account could be like a pizza shop,
18 and then, you know, that can go up to like, you know, a small
19 office building. So let's say anything up to a couple hundred
20 kilowatt hours, 200 or 300 RCEs. Then a medium size can go up
21 to let's say like a million kilowatt hours.

22 Personally, I considered anything from 750,000
23 kilowatt hours to like 2 million -- I would say anything above
24 2 million was like a large deal. Anything from 750 to 2
25 million was probably like a medium size but a good healthy

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1 deal.

2 Q. OK. And would Major Energy have one set price for whether
3 it's a large deal, medium size or a small deal?

4 A. No, these prices were based on like how large the account
5 was typically. When they are customed priced or matrixed, they
6 would be like different margins in order to be more competitive
7 on the larger deals.

8 Q. So, did Major Energy have a set margin policy?

9 A. Nothing set like in stone but, you know, we wanted to make
10 money obviously but there was nothing set in stone. We went
11 and like let's get that deal done, because it also showed the
12 broker we got this deal, it gets the broker in the rhythm of
13 sending us deals.

14 Q. Now, would Major Energy ever be flexible on its margins?

15 A. Yes.

16 Q. Now, you described the difference between small, medium and
17 large. Did you feel it was important in trying to develop
18 business and growing the department to have this type of
19 diverse portfolio?

20 A. Yes.

21 Q. And why was that?

22 A. Because you'll never always win large accounts, or you'll
23 never always within small accounts. Also typically the brokers
24 that are bringing the large accounts and those smaller accounts
25 are also different types of brokers.

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1 If you just narrow your department down to only
2 catering to one type of broker, you're hurting yourself in the
3 future. So we always had a policy where we would be very open
4 to every single deal, Some were large, regular or small. We
5 were open to every deal. It was just let's explore it, let's
6 make money and let's make as many deals as possible.

7 Q. And did you feel that that approach and being diverse
8 helped the growth?

9 A. Yes.

10 Q. Now, did there come a point in time where you became aware
11 that Major Energy was selling itself to a company called
12 National Gas & Electric?

13 A. Yes.

14 Q. Do you recall when that was?

15 A. It was at the beginning of 2016.

16 Q. And just so we're clear, were you involved in those sale
17 negotiations?

18 A. No.

19 Q. Were you involved in the due diligence?

20 A. No. Maybe I was asked for some copies of contracts or
21 stuff but nothing serious.

22 Q. And do you recall meeting with anyone from NGE during those
23 negotiations?

24 A. No.

25 Q. Do you recall meeting with anyone from a company called

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1 Spark at that time?

2 A. No.

3 Q. Had you even heard of Spark or NGE at that time?

4 A. I don't think so.

5 Q. So how do you recall learning that Major Energy was selling
6 itself?

7 A. If I remember correctly, Mark Wiederman and Saul Horowitz
8 had brought us all into the conference room and told us that,
9 you know, that they sold the company and that was nothing to
10 worry about and we should continue doing what we're doing and
11 continue to grow.

12 Q. How did you feel about hearing the news that the company
13 was selling itself?

14 A. It was interesting. It definitely had me a little
15 concerned. You know, I wasn't sure who these people were, I
16 wasn't sure what the future really held, but I was told nothing
17 to worry about, everything is good, just continue doing what
18 we're doing.

19 Q. Now, do you recall after the announcement that the company
20 was selling itself having to talk to brokers to let them know
21 that Major Energy had sold itself?

22 A. Yeah.

23 Q. What do you recall telling the brokers at the time?

24 A. Business as usual, nothing changes, just behind the scenes,
25 you know, we're here, we're not going anywhere, and keep doing

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1 what you're doing, we'll keep doing what we're doing.

2 Q. OK. I want to show a document -- again it's in your binder
3 as well if you want, but it's not a large document, so it might
4 be easier on the screen -- it's Defendant's Exhibit 312.

5 So on the bottom e-mail it says May 6, 2016. I think
6 the record establishes this is a couple days after Major Energy
7 issued a press release announcing the sale. And this is an
8 e-mail from Bruce Shipper to Bruce Shipper and you are cc'd on
9 it. Do you see that?

10 A. Yes.

11 Q. And FAQs regarding the Spark Energy acquisition. Do you
12 see that?

13 A. Yes.

14 Q. It says, "With the Spark Energy acquisition of Major
15 Energy, many of our brokers have reached out to us to find out
16 if there will be any changes to operations."

17 Do you see that?

18 A. Yes.

19 Q. Is that consistent with your recollection that many brokers
20 started to reach out to find out if there was going to be any
21 changes?

22 A. Yes.

23 Q. And he writes, "In short, there will be NO changes to our
24 broker operations and will continue to be business as usual."

25 Do you see that?

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1 A. Yes.

2 Q. Is that your recollection of what the message was to tell
3 to brokers?

4 A. Yes.

5 Q. All right. Now, do you recall receiving any response to
6 this message from brokers?

7 A. Yes.

8 Q. What do you recall?

9 A. A lot of the brokers were very concerned in general. I
10 would say a lot of them also were concerned. They had previous
11 interaction with Spark, and they were not very excited about
12 the sale, and were concerned that Major was eventually just
13 going to become Spark.

14 Q. And so what did you tell them?

15 A. I said, you know, they're not going to get involved in our
16 business; you don't have to worry about it; pricing will still
17 be the same; the rates are still going to be good rates; we are
18 still going to be able to do whatever we do on our side;
19 nothing will change.

20 Q. If I could show you another document. This will be
21 Plaintiff's Exhibit 567.

22 If we could go to the earliest chain of the e-mail,
23 Eric.

24 So, here is the e-mail -- again this is May 4, which
25 we can establish which was the day that Major Energy issued the

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1 press release about the sale -- May 4, 2016. And Mr. Shipper
2 is again sending an e-mail to himself, you're cc'd on it. It
3 says "Important Major Energy update." Did you see that?

4 A. Yes.

5 Q. It's informing the valued partners of this transaction,
6 right? Do you see that?

7 A. Yes.

8 Q. And if I could turn your attention to the next e-mail of
9 the chain. So, this is Chris Martin of Phoenix Intel to
10 Mr. Shipper, and you are cc'd. Do you see that?

11 A. Yes.

12 Q. He says, "Congrats guys. Question, can I still go through
13 you? Or will I need to go through the Spark group?"

14 Do you see that?

15 A. Yes.

16 Q. And was that a broker?

17 A. Yes.

18 Q. And if you go up to the next e-mail. So Bruce responds,
19 and you are on this e-mail. "Thanks, Chris. It's business as
20 usual with Major. No need to go through Spark."

21 Do you see that?

22 A. Yes.

23 Q. And then if we go to the front page, it's Chris Martin
24 responding, and you are on this e-mail. He says, "I'm glad
25 because their process is time consuming and slow."

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1 Do you see that?

2 A. Yes.

3 Q. Is that consistent with -- let me rephrase that.

4 Did you hear that from any other brokers at the time?

5 A. Yes.

6 MS. PECTOR: Your Honor, I'm going to object to this
7 document as hearsay and object to the witness speculating.

8 MR. DAHAN: I just asked him if he heard that from
9 other brokers.

10 MS. PECTOR: Objection, hearsay.

11 THE COURT: Why isn't it hearsay?

12 MR. DAHAN: Again, I'm not going to introduce it for
13 the truth of the matter, just his state of mind at the time,
14 your Honor.

15 MS. PECTOR: Your Honor, he is trying to introduce it
16 for the truth of the matter asserted, to get in an alleged
17 opinion by a broker of what they thought, and that broker is
18 not here for cross-examination, and we don't know if what Mr.
19 Benisti is testifying is actually what the broker thought, nor
20 has any broker been identified here.

21 THE COURT: Well, if the statements of other brokers
22 go to the broker's perception, then that's not really for the
23 truth of what they're saying, so I'm going to allow it for that
24 limited purpose.

25 MR. DAHAN: Thank you, your Honor.

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1 BY MR. DAHAN:

2 Q. What did you tell brokers when you heard this concern they
3 had with Spark?

4 A. I told them that we shouldn't see any changes, and that's
5 what they're telling us. I also didn't want to come across to
6 them as maybe there will be, because I didn't want them to not
7 send us business anymore.

8 Clearly, from some of the other brokers and the way
9 people were telling me things, it was very concerning. I
10 didn't want them to believe that anything would change, and I
11 tried to make it very clear to them that nothing will change,
12 don't worry at all.

13 Q. OK. So we saw in those documents that the message was to
14 tell the brokers it will be business as usual, right?

15 A. Yes.

16 Q. So, you stayed on from this time period. And let's focus
17 between this time period and the end of 2018, OK?

18 A. OK.

19 Q. Was it business as usual, as you remember, at Major Energy
20 before this sale?

21 A. No.

22 Q. Can you explain to the Court some of the changes or things
23 that made it not business as usual in the commercial part of
24 the Major Energy business.

25 A. Sure. At times there was -- I can't recall exactly when it

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1 was, but I would say maybe, you know, six months a year after,
2 we had started seeing increases in pricing, we were not
3 competitive anymore. It was very difficult to be able to win
4 that kind of business and go down on our margins. At times it
5 was like, you know, this is the margin, that we're here and we
6 can't go down, or whatever it was. That obviously made a very
7 bad appearance to the brokers that we just told there is no
8 changes.

9 Q. Now, you talked before about presale, I believe, or part of
10 the growth mode, that diverse portfolio that the commercial
11 group had, the small, medium, large. Did the focus of the
12 types of accounts change?

13 A. At a point I remember having a conversation with Nathan
14 Kroeker, and he had told me that he wanted to see more smaller
15 commercial/larger margin.

16 Q. Now, what's wrong with just focusing on smaller/larger
17 margins?

18 A. So, first of all, you have to be able to be competitive
19 across the board when giving pricing to these brokers. Again,
20 these brokers are the ones that hold the relationship with
21 their customer. We're not talking to their customer. So, if
22 the broker is going to get the price, and we just come in high,
23 eventually the broker is not going to look at us as a
24 consistently competitive supplier. What that does is it can
25 actually do a couple things. It can ruin that relationship the

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1 broker has with the supplier.

2 Q. Now, do you recall at any point in that time period that
3 I'm discussing -- that I focused on before -- there being any
4 sort of change or any construction of a policy on margin?

5 A. There was a point -- again, I don't recall exactly when --
6 but the number 6.3 mils is sticking with me for some reason,
7 somewhere around there -- and then that was like I think the
8 target for like the smaller commercial, and then at a point
9 maybe we had brought it down to four and a half. I'm not sure
10 actually what. But there was a point where, you know, that was
11 the goal target.

12 THE COURT: When you say 6.3 mils?

13 Q. If you can explain to the Court and us what that exactly
14 means, a mil in this context.

15 A. Sure. Sorry. So an energy rate would be say seven and a
16 half cents, right? So that's the price of let's say power and
17 some other ancillary costs and capacity, whatever is in that
18 seven and a half cent rate. In that rate would be your margin,
19 so let's say in that seven and a half rate, all of your costs
20 would come up to be seven cents flat, so the .5 on top of the
21 seven would mean five mils, so it's half a penny. Or one mil
22 is a tenth of a penny, so the margin would be let's say five
23 mils in that case.

24 THE COURT: So when you say margin, it's essentially
25 the profit margin for the company?

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1 THE WITNESS: Correct.

2 Q. So again what do you recall -- and do you recall there
3 being that similar margin levels presale?

4 A. Not like a policy or not like a strict pay 6.3. If we
5 decided to mark it up -- which we didn't really do too often --
6 again, you don't want to come to your brokers with a higher
7 rate, because it's very important that the broker views you as
8 a consistently competitive supplier, otherwise the broker
9 doesn't want to do work for no reason if you're high. They
10 will skip it and move on. There are other suppliers out there
11 who are competitive, so it's important to constantly be
12 competitive.

13 Q. Now, did you ever hear of a company called -- did Major
14 Energy deal with a company called Arcadia?

15 A. Yes.

16 Q. Can you explain who that is.

17 A. Sure. Arcadia, they consider themselves a forward-thinking
18 technology and into green space kind of company, and they have
19 probably around 300,000 customers, and those customers -- in
20 the states that are deregulated -- Arcadia has a power of
21 attorney over those customers where they can sign up their
22 homes with third-party suppliers like Major, for example, as
23 long as the rate was within a certain threshold that was to the
24 benefit of the customer.

25 Q. And presale did Major Energy have a relationship with

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1 Arcadia?

2 A. Yes. Arcadia, actually part of the executive team there,
3 he was at a different company with someone else, who they kind
4 of all came together and formed Arcadia, so I have known them
5 from their previous company. But, yeah, Arcadia, I believe --
6 maybe in 2017. But I have known the guys for a while, and then
7 when Arcadia came on board, I believe '16, '17 -- I don't
8 recall exactly -- but, yeah, we did deals with them.

9 Q. OK. And did any of these changes in the margin impact that
10 relationship in any way?

11 A. Yeah. So, the way we -- I want the Judge to understand the
12 way we did deals with Arcadia, since they're residential.
13 Right? So they would aggregate a lot of deals that they had a
14 power of attorney over, so they would send us say 1,000
15 accounts, and we would price those thousand accounts as if it's
16 a commercial account, and then give it with a commercial sized
17 margin. Because, again, there is no cost for acquisition on
18 this deal, and the deal is let's say like a 10 million kilowatt
19 deal -- the deal could have been a 10 million kilowatt hour
20 deal, and the transaction could have been the same as a
21 commercial deal. So, we treated it like a commercial deal,
22 since the margin -- you know, the dollar amount that you can
23 make on a deal like that was still very profitable even with
24 the commercial margin.

25 Q. And were you able to close as many deals with Arcadia under

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1 the new margin requirements?

2 A. So, I actually recall that we were in the middle of trying
3 to close up a deal, and then when we refreshed the prices -- I
4 want to explain what refresh means.

5 So, every day the market changes, so if you priced it
6 on let's say February 15 it would give you a price of seven and
7 a half cents, but let's say on February 25 it could be a rate
8 of, you know, 7.6 cents because the market changes.

9 So, we refreshed it. We wanted to close that deal
10 that day, especially since they were also only working with me
11 at the time as we had a very close relationship, so they were
12 sending all their RFP deals to us, and I got back to them with
13 a rate that was way higher, so --

14 THE COURT: Hold on one second. They were sending all
15 what deals?

16 THE WITNESS: They were sending all of their deals,
17 their RFP deals, all of their residential accounts, they were
18 coming all to Major Energy.

19 THE COURT: Sorry I interrupted. Go ahead.

20 A. So, basically pricing went up when we refreshed it. And I
21 remember going to Levi Moeller and he had said, well, you know,
22 Spark put in new rules where there is 1.1 pennies, I think it
23 was, which was 11 mils or 12 mils margin, and I said what's the
24 point of that? I mean you're turning down money, like money on
25 the table. Literally we have done these deals before, these

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1 are clean deals. Like why raise the margin? And that really
2 threw us off, where they were not able to execute those deals
3 because their power of attorney only put them into a position
4 where they can close a deal if it's within a certain strike
5 zone.

6 Q. So, if I understand your testimony, therefore you lost
7 those deals.

8 A. Those deals I believe were not able to get contracted, yes.

9 Q. Now, I think you talked earlier about response time being
10 important in relationships, correct?

11 A. Yes.

12 Q. Did you see any change in the response time pre-sale to
13 post-sale?

14 A. There were times where we had to get different RFPs priced
15 down in Houston, and that was a nightmare. It would take them
16 weeks literally to get back to them.

17 (Continued on next page)

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1 Q. So I want to show you a document that's Plaintiff's Exhibit
2 750. If we can go to the earliest e-mail.

3 So here's the e-mail from you. This is August 3,
4 2016, to a William Palacios. Hopefully that's how you say it.
5 Who is he?

6 A. He was someone who I was put in touch with to, I guess,
7 price certain accounts.

8 Q. OK. And you say, "Hi, William, can you please price the
9 following account for Mark W." Is that Mark Wiederman?

10 A. Yes.

11 Q. You say, "Attached HU in case you want to use it." What is
12 HU?

13 A. HU is historic usage. So I want to explain why historic
14 usage is important.

15 Q. Sure.

16 A. OK. So on a commercial deal, since margins are slimmer,
17 you also want to make sure that you are pricing the account
18 correctly. The way to price an account is, you need to know
19 what type of usage the customer has, because the price of power
20 or the price of gas, the cost is a different cost, depending on
21 the month and time they use it, so there's different costs that
22 would come up with that.

23 So now that you have historical usage, you can price
24 the account different. A manufacturing plan that would use
25 gas, let's say, pretty consistent over 12 months would be

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1 different than, let's say, someone like a home or a different,
2 you know, account that only uses gas for, let's say, heating,
3 that only uses their gas during the peak time, so it would be
4 more expensive as opposed to a specific account that would use
5 gas throughout the year. That's why this historical usage is
6 used to price the account.

7 Q. And this was, I guess, for the Daughters of Jacob account
8 and for a September 2016 start. Do you see that?

9 A. Yes.

10 Q. OK. So that was sent on August 3rd, right?

11 A. Yes.

12 Q. So now, if you go up the e-mail, we're now August 5th.
13 Right?

14 A. Mm-hmm.

15 Q. And you sent an e-mail to William saying, "Do you by any
16 chance have the pricing for the account below?" Do you see
17 that?

18 A. Yes.

19 Q. It's two days later and you still did not get the pricing,
20 right?

21 A. Correct.

22 Q. So obviously you couldn't get back to them on the pricing,
23 correct?

24 A. Correct.

25 Typically, the -- like typically we would get back to

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1 the customer direct.

2 Q. OK. So now let's go to the e-mail. The next e-mail is
3 August 10th. Right? So that's seven days after your prior
4 e-mail. Right?

5 A. Yes.

6 Q. You say, "Hi William, I just called you, left a voicemail
7 on your machine. I wanted to discuss this attached RFP that I
8 sent you, was wondering if the pricing came back yet. Our guy
9 is ready to sign this account. We just need some competitive
10 pricing. Would you please be able to help me out here?" Do
11 you see that?

12 A. Yes.

13 Q. So that's seven days later, from your first e-mail.
14 Correct?

15 A. Yes.

16 Q. All right. Let's go to the top e-mail. So you had cc'd
17 Mr. Wiederman on the prior e-mail. So Mr. Wiederman responds,
18 to Mr. Alper, "The lack of response from these guys is
19 extremely frustrating. This is a very large gas accounts that
20 I have a very close personal relationship with." Do you see
21 that?

22 A. Yes.

23 Q. OK. And then it talks about, "Due to PSE gas constraints,
24 we have never been able to get gas accounts from this client.
25 However, we have over 25 million kilowatts from him. He called

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1 me that he would like to give us the gas business but due to
2 the lack of response from Spark, he's going to take his
3 business elsewhere." Do you see that?

4 A. Yes.

5 THE COURT: Quick question that I have. When you were
6 there in this time period, say summer of 2016, did you have to
7 get approval for every single RFP from the Spark main office,
8 or how did it work? Or was it only deals above a certain
9 amount for pricing, or what?

10 THE WITNESS: So the pricing got their information
11 from wherever they got their information. I was getting it,
12 let's say, from the pricing scheme. So in some cases, in most
13 cases I think we would get our pricing from the New York office
14 and in some cases we would, I'm not sure why, but we were told
15 to get -- maybe it was a gas deal, but we were told to get
16 pricing from historic.

17 Q. Now, did this -- you talked before about changes in
18 margins. You talked about some of the response time issues.
19 Did this in any way impact your relationship with the brokers?

20 A. I'm sorry. I missed the question?

21 Q. Sure. You talked before about the changes in the margin.
22 You talked now about some response time issues. And then my
23 question to you is, did that in any way impact your, you know,
24 relationship, your specific relationship with the brokers?

25 A. Yes. My relationship personally, I was telling these guys,

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1 look, nothing is going to change. But a lot of them came in
2 with a bad vibe, and then I was there saying, don't worry,
3 nothing is going to change. All of a sudden, oh, see, isn't it
4 changing? No, no, no, nothing is changing. But they would
5 say, you know, this had never happened before. And I would
6 say, oh, it's all right, you know, stuff like that. Which
7 events, at the end of the day, the brokers wanted to make sure
8 that their accounts are being looked at, looked at. They were
9 going to bring in an accountant 2016. I think like your
10 average deal is probably around 24 months at the, you know, off
11 the top of my head. So that would mean, you know, two years
12 in. And they don't know who they're dealing with now for that
13 renewal. So that's something that worried the brokers a lot.
14 They did not want to be stuck working with someone else and,
15 you know, that they don't know, especially knowing that the
16 company had a bad reputation of not being responsive and just
17 not being, you know, good to brokers.

18 Q. Now, from what you saw, being on the scene there, did you
19 see -- we saw the quarter earlier, the growth in '14, right?

20 Sorry. Yes. It was from the end of '14 to the
21 beginning of '16. Did you see that continued growth in '17 and
22 '18?

23 A. No. It was -- it just wasn't people -- the brokers
24 weren't. And they just -- it wasn't as good. It wasn't as
25 bad, but it was before, the years before were growth was --

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Benisti - Direct

1 growth was bad.

2 (Pause)

3 A. The years before the growth was there, so we were winning
4 deals.

5 Q. Now, have you ever heard of a company called Emex?

6 A. Yes.

7 Q. And did Major Energy have a relationship with Emex of about
8 the sale?

9 A. Yes.

10 Q. Was Emex -- you talked about small, medium, large. Where
11 did Emex fit into that?

12 A. I would say Emex was like the large, good.

13 Q. OK. There was have you ever heard of a company called
14 Quest?

15 A. Yes.

16 Q. Who were they?

17 A. They were a broker that I picked up in, I think it was
18 2014, in Massachusetts. They were, I would say, medium sized.

19 Q. You were describing Quest?

20 (Pause)

21 A. OK. So Quest was, I would say, I would consider them a
22 medium-size broker. And they, they were good nationally. So
23 they were actually using tremendously.

24 Q. Was Quest one of those that you brought in, from
25 Massachusetts?

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Benisti - Direct

1 A. Yes.

2 Q. Now, I want to show a document that's been marked as
3 Plaintiff's Exhibit 758. This is a 1099 form, or document that
4 has different 1099s made out in different years by Major
5 Energy. If we could look at, I guess on the bottom --

6 MR. DAHAN: May I have a moment, your Honor, so I get
7 the right cites?

8 THE COURT: Sure.

9 MR. DAHAN: All right. There we go. Thank you.

10 Q. So this would be 38. So on the bottom, the bottom 1099, if
11 you blow that up, Eric, so here is a 1099 for the calendar year
12 2015. OK? And Major Energy services. And you see Quest
13 Energy Solutions. Is that the Quest entity you were
14 describing?

15 A. Yes.

16 Q. From Auburn, Massachusetts?

17 A. Yes.

18 Q. And you see the compensation there paid to them in this
19 1099 is \$138,995? Do you see that?

20 A. Yes.

21 Q. If we could go to, I guess, on --

22 MS. PECTOR: Is there a page number?

23 MR. DAHAN: I'm sorry. That was 38, I think.

24 This would be 58870. Yes.

25 Q. So there you see Quest on the bottom. So now we are, the

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Benisti - Direct

1 1099 for 2018. Do you see that?

2 A. Yes.

3 Q. And now it's \$64,413. Do you see that?

4 A. Yes.

5 Q. That's about a, you know, at least half?

6 A. Yeah, mm-hmm.

7 Q. Is that consistent with your recollection of the size of
8 the dip in the bids?

9 MS. PECTOR: Objection, your Honor, leading.

10 THE COURT: Sustained. Rephrase, please.

11 MR. DAHAN: Sure.

12 Q. Are the two numbers you saw consistent with your
13 recollection as to how the relationship of the business was
14 with Quest between those two years?

15 A. Yes.

16 THE COURT: Can I ask another question. With these
17 brokers' relationships, was there a standard percentage that
18 they took, or is it something that fluctuated broker by broker?

19 THE WITNESS: It fluctuated broker by broker.

20 THE COURT: OK. And what's the ballpark of what the
21 broker's percentage was?

22 THE WITNESS: It wasn't like a percentage. It was
23 what they cut them a deal. So maybe like an average of -- it
24 really differed, you know, broker by broker. So some were, you
25 know, strictly like 2 1/2 million, some were 3, some were 4, 5

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Benisti - Direct

1 and then you had some that were more, like a lot.

2 THE COURT: Thanks.

3 Q. You talked before about Emex, and you described them, as I
4 think, call it in the larger commercial deal range?

5 A. Yes.

6 Q. Let's look at, in this document, let's go to, on the bottom
7 of the Spark NGE space 58663. There we go. That's 14. OK.

8 So here is Emex LLC. So the Emex entity?

9 A. Yes.

10 Q. So here is the 1099 for Emex 2015, right?

11 A. Yes.

12 Q. And the payment to them for that year was \$440,811. Do you
13 see that?

14 A. Yes.

15 Q. Is that consistent with a large account?

16 A. Yes.

17 Q. OK. Let's look at 2016 calendar year, what Emex was
18 getting paid. So that is on 73, 073. So here is the following
19 year. They're getting now paid \$484,688. Do you see that?

20 A. Yes.

21 Q. So between those two years, that's an average of about
22 \$460,000?

23 A. Yes.

24 Q. Let's see what they got paid in 2018. So this is on page
25 191 of this document. Same Emex entity, calendar year 2018,

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Benisti - Direct

1 right?

2 A. Yes.

3 Q. \$153,908, right?

4 A. Yes.

5 Q. That's over \$300,000 less than they got paid last time?

6 A. Yes.

7 Q. About a quarter, right?

8 A. I'm not a math -- somewhere there, yeah.

9 Q. Does that surprise you, from what you saw on the scene?

10 A. No.

11 Q. Now, I was focusing before on the up to 2018, right? You
12 stayed on in 2019, right?

13 A. Yes.

14 Q. You left pretty much at the end of 2019, right?

15 A. Yes.

16 Q. Did you see the commercial department get better in 2019
17 than it was in 2018?

18 A. No.

19 I voiced my opinion as an agent broker multiple times
20 and told them how I think that this was done super fast, and he
21 said OK, and he just, I hear you, looking to make it better.
22 It was not good.

23 MR. DAHAN: Your Honor, I will pass the witness. I
24 just want for someone to give me the exhibits to move in.

25 So Plaintiff's Exhibit 414, Plaintiff's Exhibit 359.

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Benisti

1 Defendant's Exhibit 312. Plaintiff's Exhibit 567, Plaintiff's
2 Exhibit 750, Plaintiff's Exhibit 758. Thank you, your Honor.

3 THE COURT: They are received.

4 (Plaintiff's Exhibits 414, 359, 567, 750, and 758
5 received in evidence)

6 (Defendant's Exhibit 414 received in evidence)

7 THE COURT: Cross-examination?

8 MS. PECTOR: Yes, your Honor. I have a binder to pass
9 up.

10 THE COURT: All right. I have to handle another
11 matter, but I can do it in the robing room, if that's easier,
12 so you guys can just take a ten-minute break. Yes. We'll take
13 about ten minutes. And if you want to step down.

14 MR. DAHAN: Thank you, your Honor.

15 (Recess)

16 THE COURT: I apologize for the delay, folks. I wish
17 you could have seen what happened in that robing room. High
18 drama.

19 MR. MAROONEY: Your Honor, before Ms. Pector gets
20 started with her cross, I'd like to take up a matter with one
21 of the exhibits we see in the binder. Sorry to start this way.

22 And may I sit down so I can talk in the mike?

23 THE COURT: Sure.

24 MR. MAROONEY: We previewed in our opening, you've
25 seen snippets of evidence out of context and defendants'

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Benisti

1 continued attempts to embarrass and assassinate, try to
2 assassinate the characters of our witnesses. And DX 1079
3 epitomizes that very effort. It's an over-400-page exhibit, as
4 you see in your binder. And defendants added it to their
5 exhibit list about two and a half weeks ago or so. When we
6 first saw it, we thought it was horrible.

7 THE COURT: Is this DX 1079?

8 MR. MAROONEY: Yes. And we actually thought it was an
9 attempt to intimidate Mr. Benisti from coming to testify.

10 When Mr. Benisti left, they took his phone, Spark took
11 his phone, his personal phone, and they copied it. And
12 apparently they have now rifled through it. And they have
13 created DX 1079, which is, apparently, a chart. The first 123
14 pages are a chart of some sort of messages organized in groups
15 by correspondent, and there's no real consistency in the time
16 periods for the messages, and there are different
17 correspondents. You can even see that on the first page, where
18 there are messages from some person named David Tauber and Adam
19 Westbreich.

20 THE COURT: David?

21 MR. MAROONEY: David Tauber, T-a-u-b-e-r, and Adam
22 Westbreich from random days in February, March, and April. And
23 then you see from pages 124 and 149 charts showing different
24 types of messages and chats, obviously cobbled together at
25 counsel's selection. The remainder, candidly, are lewd and

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Benisti

1 improper photos and internet memes and, you know, they're
2 really off color.

3 And as I said we were thinking about, we didn't
4 actually know that they would have the audacity to try to use
5 this, assumed that they wouldn't, but apparently they are. So
6 we object to that exhibit. It's inadmissible on multiple
7 grounds, 901, 806, 802, 803, relevance, prejudice.

8 THE COURT: Form.

9 MR. MAROONEY: Forum, right. Form, sorry. And
10 improper impeachment.

11 So I didn't want to interrupt the exam. So I just
12 wanted to raise it now so we can just clear it.

13 THE COURT: OK. Do you want to respond?

14 MS. PECTOR: Yes. I'd be happy to respond, your
15 Honor. Exhibit 1079 is a series of WhatsApp chats between
16 Mr. Benisti and various other individuals, some of whom will
17 testify in this case, including David Sobel, the CFO. I
18 believe that Mr. Marooney's primary concern is that there are
19 certainly some salacious pictures that are in the file. The
20 reason why that was there, your Honor, is, there have been
21 allegations in this case by sellers that they were kept so busy
22 during the earnout period that they couldn't do anything except
23 what Spark asked them to do. And that activity that you see in
24 the WhatsApp demonstrates otherwise. For purposes of this
25 witness, I have no intention, your Honor, to go into any of

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Benisti

1 those salacious pictures. In fact we've already instructed our
2 trial graphics consultant to redact out all of that, so none of
3 that is going to be shown. But, your Honor, the information
4 that you're going to see in DX 1079 is extraordinarily relevant
5 to this witness's testimony. And I believe that the plaintiffs
6 don't want this Court to see it. It is directly relevant to
7 the question of, are these brokers really leaving because of
8 Spark, or are there other reasons. And if you'll allow me to
9 lay some foundation.

10 THE COURT: I'm not going to look at any of those
11 memes or anything. That's not relevant.

12 MS. PECTOR: We're not putting up any of that.
13 Everything that we're using for this cross-examination is
14 purely substantive facts of what happened, not the jokes. It's
15 not pictures. It's not memes. It's actually activity and
16 conversations that are going on about business plans unrelated
17 to Major Energy while these individuals are working for Major
18 Energy. And honestly, there is evidence of diversion of
19 customers that are ongoing during the earnout period that is
20 going to be relevant to why adjusted EBITDA wasn't achieved,
21 why customer count is down.

22 THE COURT: OK. Well, I'll allow you to cue this up
23 if it's relevant, but I'm not going to allow anything that's
24 prejudice, of a personal nature.

25 MS. PECTOR: I agree, your Honor. We're not getting

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Benisti - Cross

1 into any of that.

2 CROSS-EXAMINATION

3 BY MS. PECTOR:

4 Q. Good afternoon, Mr. Benisti.

5 A. Good afternoon.

6 Q. Mr. Benisti, just to step back for a moment so I understand
7 your role at Major Energy, I believe you testified to Mr. Dahan
8 that you were the director of business development. Did I hear
9 that correctly?

10 A. Yes. Actually, in one of the e-mails I saw, it just said,
11 on the bottom of the e-mail, commercial broker networker, so
12 commercial development.

13 (Pause)

14 A. So I noticed in one of the e-mails that it says just
15 commercial broker networker on the bottom of my e-mail. The
16 title is something that we didn't walk around. This is my
17 title. That is my title. I'm not other people. But so I
18 guess, yes, I was -- I referencing the relationships between
19 the brokers at Major Energy.

20 Q. So your actual title at Major Energy was commercial broker
21 networker. Is that what you're saying?

22 A. How about -- I don't know exactly what it was on paper, the
23 exact words, but I know what my job was supposed to be.

24 Q. OK. It's fair to say at that your job was to work on the
25 broker side of the house, not the door-to-door vendor side of

K35AHOR6ps

Benisti - Cross

1 the house?

2 A. Yes. I wasn't really tasked with anything door to door.
3 It wasn't my job.

4 Q. And the door-to-door side of the house primarily focuses on
5 residential customers, correct?

6 A. I don't think that was like the crux. I mean, in most -- I
7 would say most suppliers out there, in their broker network, it
8 just means that it's the broker network. Naturally, brokers
9 would go after commercial business. That's money that will
10 make up their time. But brokers were also big on the potential
11 account.

12 Q. Mr. Benisti --

13 A. Brokers means residential and commercial, but probably
14 mostly commercial.

15 Q. I think you misunderstood my question. My question was on
16 the door-to-door-vendor side of the house. That's primarily
17 residential, as contrasted to the broker side of the house,
18 which is primarily commercial. Correct?

19 A. I would say so.

20 Q. And your role, on the commercial broker side of the house,
21 was to help develop business with brokers with commercial
22 accounts, right?

23 A. I'm sorry, I missed the -- help develop?

24 Q. Help develop broker relationships to bring in commercial
25 accounts. Right?

K35AHOR6ps

Benisti - Cross

1 A. Correct.

2 Q. And when commercial accounts are brought in, commercial
3 accounts are measured by RCEs correct?

4 A. Yes, you can measure by RCEs.

5 Q. And whereas on a residential account, you would actually
6 count every single customer as a customer, correct?

7 A. I wasn't on the door-to-door side, so I wasn't familiar
8 exactly how they were measured.

9 Q. But you know on the brokers side that the measure on the
10 commercial side is RCE, right?

11 A. I really, me personally? I did not consider it all the
12 time by RCE. I look at it like this is a 1 million kilowatt
13 hour deal.

14 THE COURT: One million kilowatt hour deal.

15 THE WITNESS: Correct. Yes. There are people that
16 would be incented at 1,000 RCEs. But, yes, personally I would
17 like to use it as 1 million kilowatt hour deal.

18 Q. Now I just want to talk to you briefly about the structure
19 of what is it that brokers do for Major Energy. So as I
20 understand it, based upon your testimony, a broker is a
21 middleman that is bringing a relationship they have to Major
22 Energy to try and sell electricity or gas. Correct?

23 A. Yeah. They would broker it out to multiple different --

24 Q. And when they broker it out, they are adding a margin for
25 themselves into the price, which ended up being their residual,

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Benisti - Cross

1 correct?

2 A. Yes.

3 Q. And the difference between a residual and a commission is
4 that the residual is paid on the back end, correct?

5 A. I don't understand the question.

6 Q. Are you familiar with what the difference between a
7 residual is and a commission?

8 A. A commission is -- a residual is a form of commission.

9 Q. And a residual is the type of commission that would be used
10 for a broker, meaning you pay the broker on the back end once
11 the customer comes in the door. Correct?

12 A. I really don't understand your question.

13 Q. Let me make it more simple for you. At what point in time
14 is a broker paid by Major Energy?

15 A. So a broker would bring us, let's say a 1 million kilowatt
16 hour deal. We would give it to him at whatever margin we
17 decide to give it to him at. He would mark it up. Whatever
18 the broker marks it up at makes the deal difference to Major
19 Energy, because we had already decided what we're putting in as
20 our market. We have a max. We would max them out. And at
21 some point we would allow them to go over that cap. And at
22 that point there would be a split between the broker and the
23 supplier.

24 (Continued on next page)

K357HOR7

Benisti - cross

1 Q. Now, between 2016 and 2018, what was the cap that a
2 residential -- I'm sorry. What was the cap that a commercial
3 broker could go up to?

4 A. It was one penny, I believe.

5 Q. One penny is ten mils, correct?

6 A. That would be ten mils, correct. And anything above that
7 typically we would split between the supplier and Major and the
8 broker. And in some cases we would also actually allow the
9 broker to keep the whole thing based on the relationship that
10 we had with the broker.

11 Q. So you're saying that in some instances you would allow the
12 broker to keep the entire profit margin and Major Energy would
13 make no money off the deal?

14 A. No.

15 Q. What did you mean when you said we would allow the broker
16 to keep the whole thing?

17 A. Like I said before like 20 seconds ago, so Major would give
18 a price -- a transfer price -- over to the broker, and that
19 broker would then take that price and add his margin onto the
20 deal. So, Major's margin was in there, that was never going
21 away no matter what the broker put on the deal.

22 Q. Will you agree, Mr. Benisti, that what is most important to
23 these brokers is getting the lowest price possible, because the
24 lower the price, the more margin they could build into the
25 price that the customer would accept, right?

K357HOR7

Benisti - cross

1 A. Some brokers would probably work that way. I would say
2 those are not brokers that are thriving in this industry. They
3 typically, you know, have a couple of accounts, and they are
4 looking to maximize the most money as possible on these small
5 amount of accounts that they have.

6 These standard brokers that we would work with --
7 again, there are exceptions obviously on some deals and stuff
8 like that -- but the standard brokers that we work with, they
9 would just try to add a healthy margin so that they can make
10 money on a deal and also have more of a volume that a brokerage
11 house has, a bigger volume as opposed to smaller accounts with
12 higher margin.

13 Q. You certainly did see some of those brokers though come to
14 Major Energy and try to work with Major Energy between 2016 and
15 2018, correct?

16 A. I certainly what?

17 Q. You certainly saw some brokers come to Major Energy between
18 2016 and 2018 and try and get the lowest possible price so they
19 could bill the biggest margin for themselves, correct?

20 A. I don't know if that's a hundred percent correct. I mean
21 that's what brokers did, they went around to 20 different
22 suppliers, you know, tried to get the best deal for themselves
23 typically. Sometimes the best deal would mean working with the
24 supplier who is flexible on certain contract terms. Sometimes
25 the best deal would mean the best price. But it's not

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Benisti - cross

1 something that was always it's a guaranteed we need the
2 cheapest. I would say it's a very big push for the broker to
3 obviously always be getting consistently competitive rates. I
4 would say there was definitely a push, but I don't think every
5 broker was pushed by the lowest deal.

6 I remember having times where we went down on our
7 margins just to get the deal even if we weren't matching or
8 beating the price that he had, but it's a relationship and he
9 wanted to do business with us, so he would give it to us.

10 Q. So sometimes you would bring in very low margin work to be
11 able to continue a relationship with a broker; is that what
12 you're saying?

13 A. Yes, because at the end of the day the work you are doing
14 on that account is the same work that you would be doing on any
15 of the pricing accounts or the account pricing. The more
16 work -- the only work you're doing after that would be so now
17 we have to sign a contract and the process of signing that
18 contract. So of course you want that deal.

19 I had also mentioned you want the brokers to know that
20 you're consistently competitive, and you want the brokers to
21 continue doing business with you and getting used to doing
22 business with you. So, we would always do something where
23 let's just get that deal because that means that we're in the
24 door with the broker, the broker is now receiving commissions
25 from us, now it's a way deeper relationship than just, yeah,

K357HOR7

Benisti - cross

1 we're sending him RFPs.

2 Q. There is no exclusivity with any of the brokers at Major
3 Energy, correct?

4 A. I don't think -- no, I don't think that we had any
5 exclusive.

6 Q. Those brokers can go anywhere anytime to any other
7 supplier, right?

8 A. Yes.

9 Q. And the brokers, if they decide to move their business to
10 another supplier, there is nothing that Major Energy could do
11 to stop them, correct?

12 A. There is nothing that those suppliers can do, but the norm
13 of the business in this industry -- I just want the judge to
14 understand -- in this industry it's very different than the
15 residential part of the business.

16 The residential part of the business is something that
17 a supplier would look to build as many residential accounts.
18 Obviously, that's the goal on the commercial and the broker
19 network as well, however, it's understood on all fronts that
20 when a broker gives you a 12 month deal, that's the deal that
21 you got, 12 months. If the broker resigned that customer for
22 another 12 months, that's another 12 month deal, and you can
23 almost consider that as a new deal because that's a new
24 contract that you're getting. Originally it's just a 12-month
25 deal, that's just the nature of the business.

K357HOR7

Benisti - cross

1 Q. Now, Mr. Benisti, anybody could be a broker, correct?

2 A. I think it's hard for anyone to be a broker. I mean there
3 are certain states that you have to be licensed in. Then also
4 you also have to know what you're saying; you can't just go,
5 you know, and sign some guy up. Anyone can connect with people
6 like this and make a deal, but to be a real broker I think you
7 have to know a little more than just, you know.

8 Q. What I mean by that, Mr. Benisti, is anybody at any time
9 could decide that they want to open a brokerage business and
10 then just start bringing customers to Major Energy, correct?

11 A. I guess if someone wanted to get into that business, they
12 can do it, yeah.

13 Q. Now, Mr. Benisti, all brokers are not created equally from
14 a timing standpoint. What I mean by that is you would agree
15 that some brokers do the business part time, correct?

16 A. I'm sure there are some brokers that do business part time,
17 yeah.

18 Q. And some brokers it's their full-time, all-in, that's what
19 they do, correct?

20 A. It's like every business, I guess, yeah.

21 Q. Now, Major Energy had the -- the brokers that Major Energy
22 had were on a sliding scale in terms of whether they spent
23 their full time going after business or only part time, right?

24 A. I'm not sure like what each one was doing at a certain
25 time, but...

K357HOR7

Benisti - cross

1 Q. Is it fair to say, Mr. Benisti, that from 2016 to 2018
2 Major Energy had approximately 400 broker relationships?

3 A. Like, yeah, in our system I would say we probably had
4 somewhere around 4000. A lot of those, agent codes I would
5 consider them, and some of them were let's say you can sign
6 someone up or sign a broker up, and then you don't necessarily
7 get the business from him for whatever reason -- you know, he's
8 out of business, or he found someone to sleeve his deals
9 through. I'm not sure that every single one of those 400 were
10 actively active brokers.

11 Q. In fact, Mr. Benisti, typically in a three month period --
12 which is how Major Energy would track their brokers -- it was
13 really on about 40 to 50 brokers would be active during the
14 three month period, correct?

15 A. I don't know.

16 Q. Do you know Mr. Shipper?

17 A. Sure.

18 Q. Is Mr. Shipper somebody that works with you in parallel in
19 the broker side of the house for Major Energy?

20 A. Yeah, me and Bruce have worked together.

21 Q. Do you report to Mr. Shipper?

22 A. I don't know if I ever reported to him. Maybe there was a
23 time a long time ago when I had first started, maybe like in
24 2012 or 2013. I don't recall exactly if I reported to him.
25 Possibly.

K357HOR7

Benisti - cross

1 Q. Is it fair to say that you were handling some of the
2 relationships on the brokerage side of the house, and
3 Mr. Shipper -- who was also handling some relationships -- was
4 responsible for the administrative side of the broker house?

5 A. Yeah, I would say, you know, that's kind of how we worked
6 pretty well together. I held some relationships with some of
7 the people. He also held a decent amount of relationships.

8 Q. You were just testifying a moment ago that there are a
9 variety of reasons why a broker might not be selling for Major
10 Energy at any given time. Would you agree that one reason is
11 customer fires the broker?

12 A. Who?

13 Q. If a customer fires their broker, you would agree that
14 might be a reason a broker might not be selling to Major
15 Energy, correct?

16 A. I don't understand.

17 Q. If a customer fires their broker, takes away the authority
18 for that broker to work on their behalf, that would be a reason
19 why that broker could no longer bring that customer to Major
20 Energy, correct?

21 A. The other broker could bring that business to Major Energy.

22 Q. I'm just asking you to stick with this hypothetical. Let's
23 say you, Mr. Benisti, is the broker for me, and I decide I
24 don't want to use you anymore as a broker, you would agree that
25 that would be a reason why you might not be able to bring in my

K357HOR7

Benisti - cross

1 business anymore to Major Energy, correct?

2 A. That's a difficult question to answer, but it's a
3 possibility. At the end of the day that business may come
4 through -- or to Major Energy through a different channel.
5 Being that we worked with I would say a pretty significant
6 amount of brokers in the Tri-state area, if it wasn't going
7 through one broker because he lost the deal for whatever reason
8 directly with a customer, I would say there was a good chance
9 that maybe we would have seen that price come again through
10 another broker.

11 Q. OK. So if you lose one broker, it's really not that big of
12 a deal because you might get that business through another
13 broker, right?

14 MR. DAHAN: Objection.

15 A. No.

16 THE COURT: Overruled.

17 Q. No?

18 A. I'm sorry?

19 Q. I'm sorry. I just thought I heard you testify that if you
20 lost a particular broker it might not be that big of a deal
21 because you may get that same business from another broker.

22 A. No, I'm not saying no as in the answer to your question. I
23 mean just because we lost that broker doesn't mean that we
24 shouldn't get it from another supplier -- I mean from another
25 broker.

K357HOR7

Benisti - cross

1 Q. Mr. Benisti, another reason why a broker might stop doing
2 business with Major Energy or their revenue may decline is
3 because the broker goes out of business, right?

4 A. It's a possibility.

5 Q. Another possibility could be that a broker decided that
6 they wanted to change their focus and put their time and energy
7 into another industry like healthcare instead of electricity
8 and gas, right?

9 A. It's a possibility.

10 Q. Another reason why a broker might leave is if they decide
11 they want to take their business or they're encouraged to take
12 their business to another competitor supplier, right?

13 A. Possibility.

14 Q. And another reason why we might see a decline in broker
15 prices is because they're getting a better price somewhere else
16 and maybe they don't want to come to Major Energy because of
17 that, right?

18 A. Possibility. Along with other stuff also. Because if they
19 were -- because if they were not going to send us the
20 business -- I mean it's a possibility.

21 Q. We might also see a decline in revenue for a broker based
22 upon the fact if a broker signs up one of their customers for a
23 two-year time period, or a year-time period, that eliminates
24 that particular contact, and the broker has to go out and find
25 other contacts, correct?

K357HOR7

Benisti - cross

1 A. I didn't understand that question.

2 Q. All right. You would agree that there are a variety of
3 reasons why we might see a decline in the revenue of a
4 particular broker, correct?

5 A. I'm sure there are plenty of reasons.

6 Q. And in looking at the exhibit that Mr. Dahan provided to
7 you --

8 If we can put up, James, PX758.

9 Mr. Dahan went through a couple of examples for you in
10 this exhibit, and let's just orient each other with what we're
11 looking at here. This is a compilation of 1099s for Major
12 Energy, correct?

13 A. Yes.

14 Q. Prior to coming to court, did you spend time looking at
15 this exhibit?

16 A. I looked at it.

17 Q. Did you do any statistical analysis to see what the
18 deviation was of the ups and downs of the brokers?

19 A. No.

20 Q. Did you look through it to see if some of the brokers
21 actually increased in business over the 2016 to 2018 time
22 period?

23 A. No.

24 Q. So the only thing you did was you just looked at some of
25 the numbers for what?

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Benisti - cross

1 A. What I did was I had mentioned about different brokers I
2 had called, had stoped sending us business for different
3 reasons.

4 Q. Now, in all of the examples you gave, Mr. Benisti, those
5 brokers didn't leave Major Energy, right? You continued to do
6 business with them throughout the 2016 through 2018 time
7 period, correct?

8 A. It's not like a standard thing to leave. No one is forcing
9 them to stay. It's not like they have to -- no one is forcing
10 them to leave.

11 Q. In fact, Mr. Benisti, you can't identify a single broker
12 that left Major Energy because of the dropdown with Spark,
13 right?

14 A. Like I said, brokers don't just leave and say we're ripping
15 up the contract, but internally they make decisions as to where
16 they want the account to go.

17 Q. But as you sit here today, you can't identify a single
18 broker that left Major Energy because of the dropdown to Spark,
19 correct?

20 A. I can't answer yes or no, because, like I said, brokers
21 typically are not saying, hey, Amir, I'm out, adios. I mean
22 it's just internally they will voice their opinion to me and
23 different frustrations that they've gone through, and then they
24 will slowly just say, listen, I wish I could send your
25 business. I've heard this from multiple brokers, I want to

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Benisti - cross

1 give to you, I just can't.

2 Q. But you can't identify a single broker that stopped giving
3 you business because of the dropdown to Spark, correct?

4 A. I mean I think I just answered the question. It's not a
5 yes or no question. I mean it's -- it's hard for me to say yes
6 or no. I have to look through all the papers to see if there
7 is something that I can identify or even think about it. You
8 mentioned there are 400 brokers. I was in there busting my ass
9 every single day for a very long time talking to these people.
10 How many different brokerages I see every single day? It's not
11 something off the top of my head I can say I remember him.

12 This is something where I'm recalling there were
13 brokers that were extremely frustrated with the changes that
14 happened, and I recall, and based on just what they told me and
15 things they said, yeah, I wish I could send you this business
16 but I can't and their numbers declined. Again, it doesn't mean
17 they're walking away.

18 Q. I'm just asking you, Mr. Benisti, just a simple question.
19 As we sit here today you cannot identify a specific broker who
20 came to you and said, Amir, I am leaving Major Energy, I'm not
21 doing business with you anymore because of the dropdown to
22 Spark, correct?

23 A. Do you want me to go through every broker and every agency
24 to see if I can wrack my brain? I don't know.

25 Q. Let's look at some of the data in PX758 where there is

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Benisti - cross

1 actually an increase in the activity of a broker. So are you
2 familiar with TR Group? Is that a broker you are familiar
3 with?

4 A. Where are they?

5 Q. I'm just asking you -- I'm asking you just the question, TR
6 Group, is that a broker you are familiar with?

7 A. Do you know what their agent code is?

8 Q. TR Group.

9 A. No, agent code.

10 Q. Well, let's look together.

11 James, if you can pull up 49 of this exhibit, and
12 specifically let's look up TR Group, which is TR Group LLC.
13 There we go.

14 So here is an example of a broker, TR Group LLC. In
15 2015 their total 1099 value was \$740.67. Do you see that?

16 A. Yes.

17 Q. And is that a broker you are familiar with?

18 A. No.

19 Q. Would it be fair to say, Mr. Benisti, that not all the
20 brokers that are in Exhibit 758 are your personal broker
21 relationships?

22 A. We had active a couple hundred brokers, so it's not -- I
23 don't -- I mean maybe I'm not as good as I thought I was, but
24 it's very difficult. I held relationships with the people I
25 saw potential in and with the ones I personally connected in.

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Benisti - cross

1 So, if there was a personal relationship, a personal
2 connection, it was easier way to go and generate business that
3 way.

4 Q. What is the ballpark of the personal relationships that you
5 say you had between 2016 and 2018 for Major Energy?

6 A. Between when?

7 Q. Between 2016 and 2018?

8 A. The personal relationships?

9 Q. Yeah, what's your ballpark.

10 A. Ballpark? I guess personal where like I was really close
11 to them and like on a personal level?

12 Q. Sure?

13 A. I would say maybe 40, 50, you know, where I can just call
14 and say, hey, what's up, and just chat.

15 Q. All right. So we're looking at TR Group, and we see that
16 in 2015 their total revenue was -- the total amount they
17 received was \$740.67. Now let's see what happened to them in
18 2018.

19 James, can you go to P236.

20 All right. So here we are now looking at what was TR
21 Group's performance in 2018? And do you see, Mr. Benisti, that
22 they jumped from \$740 to \$93,073.85?

23 A. Yeah.

24 Q. Let's try another example. Let's go to Power 7 Group.

25 A. TR Group, right, do you know what the name of the broker

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Benisti - cross

1 is? That's an LLC. There are plenty of LLCs that they did
2 business with us through a, you know, a name. I'm not
3 remembering the name that was signed on the broker agreement.
4 If you can give me the guy's name, I can --

5 Q. Mr. Benisti, do you have any reason to believe that this is
6 not true and correct information on the 1099s in terms of what
7 these brokers were earning on an annual basis?

8 A. All I'm saying is if you're asking me to recall certain
9 things, this is an LLC name.

10 Q. I'm just using the exact same document that Mr. Dahan used
11 when he went over Quest and Emex with you.

12 A. Yeah, those are broker dealers names that I can remember.
13 Emex is, you know, a name that's the name of their actual agent
14 code. Quest, their agent code was Quest.

15 Q. I'm working off the document Mr. Dahan worked off with you,
16 so let's just continue. If we can go to page 37, Power 7
17 Group, and see what their performance was in 2016.

18 And there, Mr. Benisti, we are showing a performance
19 of \$165,646.30. Do you see that?

20 A. Yes.

21 Q. Let's now pan to what they did in 2018.

22 James, if you can go to page 220.

23 And in 220 they jump to \$261,421.71. Correct?

24 A. Yes.

25 Q. You will agree that was an increase, right, Mr. Benisti?

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Benisti - cross

1 A. Yes, this is Abe Farkus, and this happened -- I have a very
2 close relationship with Abe. This was strictly because of the
3 relationship that I had with him and him literally, you know,
4 just sending me business knowing that, you know, that Major
5 Energy was a company that was eventually going to come down.

6 Q. Well, he certainly didn't stop doing business with you
7 because of the dropdown with Spark, right?

8 A. I would say -- I mean he increased it, yeah.

9 Q. So, Mr. Benisti, just to be clear, you were paid an annual
10 salary by Major Energy every year to go out and enhance the
11 broker network, correct?

12 A. Correct.

13 Q. And your annual salary I believe was \$137,500; is that
14 correct?

15 A. The salary was at 100, I believe, and I would get a bonus.

16 Q. When you factored in your bonus, was it about \$137,500?

17 A. Makes sense.

18 Q. And you were paid to do the job of taking care of the
19 broker network, right?

20 A. Yep.

21 Q. OK. Let's look at another example, Synergy Healthcare.

22 James, if --

23 well, let me just take another example. If we can
24 look at Upstate Utility Consultants, which is on page 50 and
25 let's look at what happened to them on 2015. In 2015 they

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Benisti - cross

1 generated \$119,395.62, right?

2 A. Correct.

3 Q. And if we look at 18 -- page 237, James -- in 2018 we are
4 seeing them jump up to \$153,308.90, correct?

5 A. Correct.

6 Q. You will agree, Mr. Benisti, that that's an increase?

7 A. It's an increase of around -- yeah.

8 Q. Let's take another example.

9 James, if we can go to Energy Auction House on page
10 15.

11 Now, in 2015, Mr. Benisti, this exhibit is showing us
12 that Energy Auction House generated \$13,209.51. Did I read
13 that correctly?

14 A. Yes.

15 Q. Let's see what they did in 2018.

16 James, if you could go to page 192.

17 And there we're seeing quite a large jump from 13,000
18 to \$282,407.16, right, Mr. Benisti?

19 A. Right.

20 Q. You will agree that was an increase.

21 A. Yes.

22 Q. Let's do just one more example. Let's try Lightstar Energy
23 Group -- on page 27, James. And there we see in 2015 they were
24 at \$51,096.80, correct?

25 A. Correct.

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Benisti - cross

1 Q. And if we see what they did in 2018 -- let's go to page
2 208. And there we're seeing them jump from 51,000 to
3 \$166,970.86, correct?

4 A. Correct. I want to point something out, that this is a
5 relationship of -- very very close -- probably one of my
6 closest relationships with a broker. The increase there was
7 very much driven by me really, you know, trying to go like and
8 take everything and kind of, you know -- she also never worked
9 with Spark previously, so she didn't know, you know, about the
10 Spark. And then also some of changes I was really able to, you
11 know, give her a little bit of -- navigate a little better,
12 which was a lot more work for me, but that was --

13 Q. So this increase was due to you doing your job for Major
14 Energy, correct?

15 A. Correct.

16 Q. So you didn't have any problem enhancing that relationship
17 during the earnout period from a monetary standpoint, correct?

18 A. Sorry?

19 Q. You didn't have a problem increasing the revenue from that
20 broker during the 2016 to 2018 time period, correct?

21 A. I'm sure it was a little hard at times with the changes of
22 rate, and if there were no changes at all that number probably
23 would have been a lot higher.

24 Q. Let's talk about rates, because up until the time when Levi
25 Moeller left in August of 2018 he was the individual at Major

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Benisti - cross

1 Energy that was handling pricing, correct?

2 A. He oversaw the suppliers, yes.

3 Q. So when you had a broker who needed pricing, he was the
4 person you would get that pricing?

5 A. Sure.

6 Q. And that remained the case through all of 2016 -- from 2016
7 all the way until he resigned in August of 2018, correct?

8 A. Not in every single case. Some cases we were told to get
9 pricing from Spark.

10 Q. Well, in those cases there were instances where Major
11 Energy was not operating in a particular territory but they
12 were still trying to sell some business so they could get
13 pricing from Spark to sell Spark Energy in that territory,
14 right?

15 A. It's possible. That's one of the things we told the
16 brokers that we would be able to do.

17 Q. OK. Mr. Benisti, without going through all of Exhibit 758,
18 would you agree with me that if we were to go over it in
19 granularity we would see several brokers -- in fact a large
20 number of brokers in Exhibit 758 -- whose revenue or
21 commissions increased between 2016 to 2018? Correct?

22 A. The ones you showed me had increased, yes.

23 Q. Now, Mr. Benisti, it wasn't just those brokers that had an
24 increase. You also had your own personal brokerage, correct?

25 A. No.

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Benisti - cross

1 Q. Your wife did not have a broker that you were supporting?

2 A. My wife worked part time for the broker.

3 Q. And what was the name of your wife's broker?

4 A. She worked for a company called Meretz Energy.

5 Q. And Meretz Energy is a broker company that you helped your
6 wife bring in deals for while you were working at Major Energy,
7 correct?

8 A. If she needed assistance, I would assist her like I would
9 assist anyone else.

10 Q. Is it your testimony before this court that all you did was
11 provide your wife some assistance from time to time with
12 Meretz?

13 A. If there was something I was able to help her with, I
14 helped her with it, yeah, the same way I would help other
15 brokers that I do relationships with.

16 Q. And is it your testimony that your wife was the one leading
17 the charge in and making the decision about Meretz and not you?

18 A. Sorry?

19 Q. Is it your testimony that your wife was the one leading the
20 charge and making the decisions about Meretz, not you?

21 A. She was the -- no, she wasn't a hard decision maker on
22 certain things.

23 Here is the story. I mean the person who started
24 Meretz Energy actually passed away and died, so we were at the
25 stage where it was actually my best friend's father and I was

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Benisti - cross

1 very close to him, and I took it as my responsibility to, you
2 know, if they needed help on something, I was there; the same
3 way you would help someone who just lost a father.

4 Q. When did you take over ownership of Meretz?

5 MR. DAHAN: Objection.

6 A. I don't own it.

7 Q. Well, when did you take over responsibility? I thought you
8 were saying you opened it.

9 A. No, I did not.

10 Q. You say you took over responsibility for it?

11 A. I did not take over any responsibility of Meretz.

12 Q. So when did you step in and start taking better care of
13 Meretz?

14 A. There was no better care. If any other of the brokers out
15 there needed help with whatever it was, if I could help them, I
16 would help them.

17 Q. OK. Mr. Benisti, you will agree with me that your role at
18 Major Energy was to focus on the broker relationships for Major
19 Energy, correct?

20 A. Yeah.

21 Q. Your role was not to create your own brokerage account and
22 try and bring in business through your own broker account to
23 Major Energy, correct?

24 MR. DAHAN: Objection to form.

25 THE COURT: Overruled.

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Benisti - cross

1 A. I'm sorry. What's the question?

2 Q. Your role for Major Energy was to focus your time and
3 effort on handling the broker relationships for Major Energy,
4 correct?

5 A. Correct.

6 Q. Your role was not to spend your time and energy developing
7 business for other brokers like Meretz, correct?

8 A. It was to spend -- yeah, you know, in order to enhance and
9 bring in business.

10 The question was again? Ask the question again.

11 Q. Your role was not to work for brokers while you were
12 working for Major Energy, correct?

13 A. Correct.

14 Q. And your role was not to spend your time and attention
15 looking for opportunities for brokers with other suppliers
16 while you were working for Major Energy, correct?

17 A. Correct.

18 Q. All right. Now, you are familiar with Meretz, so let's see
19 what the performance of Meretz was during the same time period.

20 James, if we can see the same exhibit, let's look at
21 2016 and see what Meretz did on page 91.

22 All right. So there, Mr. Benisti, Meretz Energy
23 Group -- that's the company we're talking about, correct?

24 A. Yes.

25 Q. That's the company your wife is involved in, correct?

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Benisti - cross

1 A. Yes.

2 Q. And that's the company you provided support to, correct?

3 A. Like every other broker, yes.

4 Q. So your testimony is that the way that you supported Meretz
5 is exactly the same as you would support any other broker?

6 A. Like Life Star, the other broker you mentioned, the owner
7 of that company also passed away when the person doing who was
8 doing all the sales for that company, she turned to me as well.
9 That's the kind of person I am.

10 Q. What was the name of that company?

11 A. Life Star.

12 Q. Did you have another broker named MBA?

13 A. That was an agent code that I used to track different
14 accounts that would come off of a fixed rate, because we
15 wouldn't want them to get, you know, stop paying a variable
16 rate, so it was a way to get the e-mails if this account has an
17 expiration date. I was not getting paid on those accounts.

18 Q. Did you or your wife get commissions from Meretz?

19 A. My wife was -- Meretz was getting the Major Energy
20 commissions.

21 Q. And those commissions were coming from Meretz to your wife,
22 correct?

23 MR. DAHAN: Object to the form.

24 A. I have no idea.

25 MR. DAHAN: She is an employee, your Honor. She is

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Benisti - cross

1 being paid as an employee.

2 THE COURT: Well, was she paid as an employee or
3 commission?

4 THE WITNESS: As an employee.

5 Q. Is your testimony that she was working as an employee of
6 Meretz who was a broker for Major Energy that you were taking
7 care of?

8 A. She was a part time employee. She also did some sales, it
9 happens to be. The truth is on those sales that she had done,
10 she did get commissions on those.

11 Q. Now, let's look at what Meretz did in 2018.

12 James, can you go to page 211.

13 Meretz increased from 2016, it was only \$3,225 up to
14 \$80,3330, correct, Mr. Benisti?

15 A. Yes.

16 Q. And did you personally -- well, you personally monetarily
17 benefited from that amount, right?

18 A. From this 80,000? I mean that went to Meretz which
19 eventually was being used to pay for my wife's salary.

20 Q. OK. Are you familiar, Mr. Benisti, with TLG?

21 A. Yes.

22 Q. TLG is a broker that Mark Wiederman had, correct?

23 A. I believe it was his brother.

24 Q. Your testimony is that TLG was Mark Wiederman's brother's
25 brokerage?

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Benisti - cross

1 A. I believe it was his brother, and Mark I believe was the
2 one who he sometimes -- or like a lot of times he would deal
3 with the actual customer, but Mark's brother I think did some
4 service to the nursing home industry, so he would either refer
5 them and this was his way of I guess, you know, his brother
6 making money on those deals.

7 Q. TLGC was also a broker for Mark Wiederman, correct?

8 MR. DAHAN: Objection. To the form.

9 Q. Yes, TLGC was a broker of Mark Wiederman, correct?

10 THE COURT: What do you mean by a broker of Mark
11 Wiederman?

12 MS. PECTOR: Meaning it's his brokerage account.

13 MR. DAHAN: No foundation for that, your Honor.

14 THE COURT: You can answer if you know.

15 A. I don't know if he owned it. I don't know if he owned it.
16 I don't think he owned it.

17 Q. Do you know if Mr. -- well, do you know that Mr. Wiederman
18 was responsible for the TLEDC broker relationship?

19 A. I'm not sure.

20 Q. So, Mr. Benisti, isn't it true that over a five year time
21 period you spent your time and effort helping Mr. Wiederman
22 manage the TLG accounts?

23 A. I would look after them, you know, just the way we wouldn't
24 want these accounts to fall into variable, for example, so,
25 yeah, I would look after those accounts, same way people in the

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Benisti - cross

1 organization were also getting e-mails to make sure those
2 accounts don't fall onto a variable rate.

3 In this industry it's unfortunate, but once the
4 account comes off that fixed rate, a lot of suppliers will
5 double the rate, and that will ruin a lot of relationships with
6 the customer.

7 So it was very important to make sure -- it was very
8 important to make sure that these accounts, no matter whose
9 account it was, was tracked after and made sure that they
10 weren't falling on variable rates.

11 Q. Were you told by Mr. Wiederman to give the TLG accounts
12 special treatment?

13 A. I don't think special treatment.

14 Q. Didn't you spend a lot of your time working for those TLG
15 accounts to help maintain their relationships?

16 A. I spent time on those accounts. I wouldn't say a lot of
17 time. I don't think there were unusual relationships there.

18 Q. Mr. Benisti, are you close to David Sobel, who was the CFO
19 of Major Energy?

20 A. Yes.

21 Q. And did you and Mr. Sobel exchange WhatsApps routinely?

22 A. I would say so.

23 Q. And did you sometimes send voice recordings to Mr. Sobel
24 with things that were on your mind?

25 A. I would -- yeah, I would just, you know, voice my -- it all

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Benisti - cross

1 depended on where I was, how I was feeling, or how I was
2 feeling towards certain people at times.

3 Q. After Mr. Wiederman was terminated from Major Energy, you
4 knew he went to go work for Alpha almost immediately, correct?

5 A. Yeah, I think I saw him on LinkedIn.

6 Q. You also knew that Mr. Moeller had gone to work for Alpha
7 immediately after he resigned from Major Energy, correct?

8 A. I didn't know that.

9 Q. And you yourself were considering possibly going to work
10 for Alpha if you could get an ownership interest, correct?

11 MR. DAHAN: Objection. Form. Lack of foundation.

12 THE COURT: Overruled.

13 A. What's the question?

14 Q. You yourself were considering potentially going to Alpha if
15 you could get an ownership interest, correct?

16 A. It may have been like something in the back of my mind. It
17 wasn't a -- it wasn't something that I wanted.

18 Q. Well, during the earnout period, you and Mr. Wiederman had
19 a falling out, correct?

20 A. Had a who?

21 Q. A falling out. You had a disagreement?

22 A. When, when?

23 Q. In 2018.

24 A. I had a fallout with him; it was something that I thought
25 he did, and later on I found out it wasn't him.

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Benisti - cross

1 Q. And the thing that you thought he did was he hired away
2 Chana Daskal who was one of the lead employees for Meretz.

3 A. I had a suspicion which later turned out it wasn't him.

4 Q. And you felt that when she was hired away, that directly
5 hurt Meretz in a negative way, correct?

6 A. My wife had just given birth, and she was working for this
7 company Meretz, and she was instructed to hire someone so that
8 when she is on maternity leave there would be someone in the
9 office.

10 Q. Go ahead. Sorry.

11 Do you recall feeling like you took care of Mr.
12 Wiederman's TLG accounts for five years so because of that you
13 probably had leverage to get a 35 percent interest in Alpha?

14 A. I don't recall off the top of my head, but --

15 Q. James, if you can play the audio recording for Mr. Benisti,
16 which is B46-O.

17 (Audio played)

18 Q. Mr. Benisti, does that refresh your memory that you helped
19 service the TLG accounts for Mr. Wiederman for a five year
20 period?

21 THE WITNESS: Can I ask you a question off the record?

22 (Discussion held with the judge off the record)

23 THE COURT: Well, the witness is upset that this is a
24 conversation apparently with his wife.

25 MR. DAHAN: Your Honor, can I elaborate on that? At

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Benisti - cross

1 least what we have been told from this witness when we first
2 met him was -- and then we got this -- we didn't know to ask
3 him if he had anything on his phone. My understanding -- and
4 if you want I can proffer and put him under oath so that he can
5 testify to what he is saying.

6 He is saying that sometime in 2018 they asked all
7 employees to hand over their phones, and they asked him to hand
8 over his phone; he said it's my wife's phone; I don't think
9 there are any work e-mails on this phone; and, you know, it's
10 my wife's phone, it's not a work phone. They said, well, did
11 you ever make a phone call from this phone that was for work?
12 Well, you must give it, it's unlawful, and you must give it
13 over. He asked his wife what to do, she said, no, don't give
14 it over. They're threatening me -- my understanding is that
15 one employee got turned over for not turning over a phone -- so
16 he gave it over. So he never thought in a million years one
17 day there would be a litigation six months from now and they
18 will have gone through the phones, whatever that means, and the
19 pictures and conversations with his wife. And the WhatsApp for
20 his wife is called "My love," whatever. And they're looking
21 through his WhatsApps for phones. If that's what we have
22 stooped to in this case, I don't know.

23 THE COURT: Have you objected to this document?

24 MR. DAHAN: So we objected before trial. We didn't
25 know if they were using it, maybe to scare him. Because if

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Benisti - cross

1 they really wanted to just use the important stuff, they could
2 have redacted -- I think they know the capability of redacting
3 naked pictures, or whatever else was on there. Maybe they
4 thought your Honor would see them and have an impression. They
5 could have redacted and kept what they truly wanted to use and
6 said we're redacting on relevance. But they didn't do that.
7 They produced a 400 page document making sure we saw all 300 40
8 pages of dirty pictures, jokes.

9 There's a privilege between a spouse

10 MS. PECTOR: Your Honor, with all due respect I can
11 show the Court this is not a communication to his wife. This
12 was a voice recording that he sent to David Sobel, the CFO of
13 Major Energy. And I understand why the plaintiffs want to keep
14 out the evidence that's about to come in, because it shows
15 diversion of business by --

16 THE COURT: Hold on. If this is a voice recording of
17 Mr. Sobel, it's not the same concern.

18 I'm not going to look at anything with your spouse.
19 That's another issue. That's another issue. That's a separate
20 issue.

21 But to the extent that there is something that's
22 relevant that you would have sent to David Sobel, I think
23 that's fair game.

24 MS. PECTOR: And I can show your Honor -- we can pull
25 it up so everyone can see it. I will show you the exact entry

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Benisti - cross

1 on page 69, the audio file that I just called out is right to
2 the right, and you see it's an outgoing message to David Sobel
3 on the left, and it's in response to David Sobel asking about
4 Chana Daskal, which what was the beginning of the voice
5 recording was about. "Did he go big on gifts?" Referring to
6 Mark Wiederman. "In his mind, he probably still wants to work
7 with him as you can do his work for him."

8 And that's the reference to the five years about TLG
9 and Mr. Benisti providing that support.

10 THE COURT: Well, I'm not going to allow any spousal
11 communication or anything like that, but to the extent that
12 there is communication on whosever phone that is relevant and
13 admissible in the case, then --

14 MR. DAHAN: I could see that if they had rightful
15 access to a phone. Part of our objection is that they didn't
16 have rightful access to a phone. This is not from David
17 Sobel's phone. The question here is did they have rightful
18 access to the phone to access these messages from. And that's
19 a threshold question to begin with. If they didn't have
20 rightful access -- this is not from David Sobel's phone; it
21 from his phone. So, the question is did they have rightful
22 access to his phone. And then, B, you know then we have
23 relevance and other objections.

24 But I think what the witness is complaining here is
25 that they honestly didn't have rightful access to his personal

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Benisti - cross

1 phone just because they threatened and told him you must turn
2 it over to us -- obviously he didn't know at the time they were
3 going to go through it and produce in litigation.

4 THE COURT: In most litigation you have to turn over
5 business records from your personal phone. I was head of
6 litigation in a media company.

7 MR. DAHAN: He was not a custodian in this case. We
8 named him as a witness, and then they went and looked at his
9 stuff.

10 MS. PECTOR: Your Honor, with all due respect, in any
11 case we issue a litigation hold. Litigation hold is necessary
12 for both sides. There was specific communication from counsel
13 for both sides about cell phone collection, and we were told if
14 we don't properly preserve the data -- we didn't want there to
15 be a spoliation issue on our side of the house, but Mr. Benisti
16 is an employee, and his phone was paid for by the business,
17 subject to a policy.

18 MR. DAHAN: No, it was not. Let's get him under oath
19 and it was.

20 THE WITNESS: No, I had a work phone, which I
21 offered --

22 MR. BROWN: Could I add something since we are
23 creating a lengthy record? Just to clarify the way this played
24 out. He is a current employee through 2019. He is never
25 identified by plaintiff on a Rule 26 disclosures as a witness

K357HOR7

Benisti - cross

1 who might have information relevant to the claims and defenses.
2 We don't know that he is even going to be a trial witness in
3 the case until we get not a direct witness statement from him,
4 but we're told they're calling him to do a live direct, and
5 they've obviously worked with him, because Mr. Benisti has
6 referenced he told Mr. Dahan certain things in preparing for
7 his testimony.

8 As soon as we find out he is going to be a witness at
9 trial -- after having not been a Rule 26 witness -- we then
10 figure out does he need to be a custodian, and does he have
11 relevant information that we might need to cross him at trial,
12 at which point we find the documents, we produced them to the
13 other side and we ask him a question, as Ms. Pector has, about
14 his communications with Mr. Sobel. That's the build-up to all
15 of this that Mr. Dahan and Marooney are trying to bring up, and
16 all we have done is play one Sobel-related message.

17 MR. MAROONEY: I'm sorry, we have talking heads here
18 popping up and talking. One, they didn't run the e-discovery
19 search protocol through it. They went through the phone that
20 they shouldn't have had and hand selected what they wanted to
21 use.

22 THE COURT: When did defendants get this phone?

23 MR. BROWN: December 2019.

24 MS. PECTOR: No, your Honor.

25 MR. DAHAN: No.

K357HOR7

Benisti - cross

1 MS. PECTOR: Let me explain. There was a litigation
2 hold that was issued. Once the litigation was issued, as part
3 of a uniform process, cell phones were collected, imaged,
4 retained. Mr. Benisti during the course of this case was not a
5 witness identified --

6 THE COURT: I know. I understand all that. I just
7 asked when the phone was taken.

8 THE WITNESS: I believe it was in April 2019. I was
9 still working there. I had no intentions to do anything. I
10 was still working there.

11 THE COURT: In any event, is this part of the motions
12 in limine?

13 MR. DAHAN: Your Honor, we didn't get this stuff until
14 after motions in limine.

15 THE COURT: OK. But it's not been the subject of a
16 motion, as far as I know.

17 MR. DAHAN: We put it on our objection list. We
18 didn't know if they were going to use it. We have a bench
19 motion we are happy to submit that we prepared.

20 THE COURT: Look, I'm going to reserve on the
21 objection, but as far as I can tell there is -- being in
22 litigation is ugly, and all your personal devices that have
23 substantive communications on them get turned over, so sorry.

24 MR. MAROONEY: I think this is being kind of taken in
25 a direction that it wasn't supposed to go. Here is the point:

K357HOR7

Benisti - cross

1 Putting aside whether they should have had the phone, not had
2 the phone, if they found a voice mail between him and Mr. Sobel
3 that they thought was relevant to the issues in the case, I get
4 that. What they did with this is bury it in a 400 page exhibit
5 filled with things that are utterly inadmissible.

6 THE COURT: I understand you're upset about that.

7 MR. MAROONEY: That is really the crux.

8 THE COURT: I understand, but let's just move on.

9 MR. DAHAN: The only other point I would make is there
10 is no evidence or any certification from them that we've gotten
11 everything. So we don't know what is on there.

12 Hypothetically -- because they didn't run it through a search
13 protocol that is helpful to us or makes -- we have no idea.

14 THE COURT: Well, that's because they learned about
15 this witness late in the process.

16 MR. DAHAN: I understand, so then you turn over
17 everything. We can tell that we've gotten piecemeals. So we
18 don't know what's on here also that we could have used or not.
19 So it's an incomplete document.

20 THE COURT: OK.

21 (Discussion held off the record)

22 THE COURT: I just explained to the witness that
23 communications with his wife I'm going to assume are protected
24 because I think those are protected under the law, and only
25 business-related communications that I determine are relevant

K357HOR7

Benisti - cross

1 are going to be admissible.

2 MR. BROWN: Could we discuss side bar and not in the
3 presence of the witness?

4 THE COURT: OK.

5 (Continued on next page)

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K357HOR7

Benisti - cross

1 (At the side bar)

2 MR. BROWN: The issues we wanted to quickly preview at
3 side bar is one of the pieces of evidence we would be using
4 with Mr. Benisti is a communication between him and his wife
5 working for a broker, discussing what we believe evidences a
6 diversion of business from Major to another company. That's
7 evidence that directly goes to some of the core issues in the
8 case. And I am unaware of a spousal privilege that would apply
9 in a civil case to evidence concerning the diversion of
10 business from Major Energy -- his employer -- and plaintiff's
11 suit in this case to another company. It's direct evidence.
12 This isn't a criminal proceeding. To my knowledge there should
13 be no spousal privilege that would apply under those
14 circumstances that would prevent us from showing that evidence
15 in direct diversion of business in a case about why business
16 was diverted.

17 MR. DAHAN: I don't see why they can't lay a
18 foundation for that, first of all. And again I don't know what
19 he is talking about, so I can't comment on it.

20 MR. MAROONEY: I think.

21 MS. PECTOR: Let me just say, your Honor -- because
22 I'm the one asking the questions, and I can tell you where it's
23 going. I did lay a foundation already with this witness. I
24 asked him about Meretz. Meretz is a company that basically he
25 and his wife run.

K357HOR7

Benisti - cross

1 MR. DAHAN: No.

2 MS. PECTOR: Meretz is a company that he and his wife
3 are running together. The communications that I intended to
4 get into are him and his wife talking about customer
5 opportunities and where should she send them. He tells her
6 don't send them to Major Energy; we're going to send them to
7 another supplier; because he is helping her with the Meretz
8 business. She is a broker in Meretz Energy, so when he is
9 having communications with his wife about what Meretz is doing,
10 that's a business relationship that Major Energy -- that he is
11 essentially helping his wife use to divert business away from
12 Major Energy to another competitor. And this is during the
13 earnout period.

14 THE COURT: Well, I mean it seems like it would
15 otherwise be relevant absent spousal privilege, right.

16 MR. DAHAN: Absent spousal privilege. It's a
17 distortion to -- I know what she is talking about and that's a
18 distortion. I know the answer to that. I mean you want to
19 step into the mud on those questions, that's fine, because we
20 will answer it and you are not going to like the answers, but
21 that's -- because we obviously saw that message.

22 MS. PECTOR: The fact that you already know what the
23 answers are means you did preview it and you did look at it.

24 THE COURT: Hold on. So I mean I haven't dealt with
25 spousal privilege actually. I don't know -- I don't think it's

K357HOR7

Benisti - cross

1 limited to the criminal context.

2 MR. DAHAN: Again it's his wife's phone. They are
3 having a communication. His wife pays for that phone. If you
4 want I will ask him under oath. It's his wife's phone and --

5 THE COURT: But he uses the phone.

6 MR. DAHAN: It's like my kids, I have an account with
7 Verizon, I buy my kids a phone, but it's his wife's phone, she
8 pays for phone.

9 THE COURT: That's not the test.

10 MR. DAHAN: It's not e-mail from Major Energy and this
11 is a communication he is having with his wife. OK? So I mean.

12 THE COURT: Are you saying spousal privilege applies?

13 MR. DAHAN: I don't know, what is the communication
14 with his wife? His wife doesn't work for Major Energy. I
15 don't understand. Why can't he assume he is having a private
16 conversation with his wife?

17 THE COURT: Because it's about a business matter
18 relevant to the case.

19 MR. DAHAN: All right, listen, your Honor, we will
20 reserve our motion objection, we will make our motion.

21 THE COURT: Is he coming back tomorrow?

22 MR. DAHAN: No. He can't. He is going out of town.

23 MR. BROWN: We feel like we're getting the clock run
24 out of with this witness. It's a lengthy direct; it was over
25 an hour. We had the break for your Honor. That's an issue

K357HOR7

Benisti - cross

1 that happens. But it took 42 minutes to get a yes or no answer
2 to a yes or no question and now we started to make some
3 progress, and now he we have this spousal issue. The witness
4 is talking to you at side bar about what he is upset about with
5 the phone. I feel like Ms. Pector has to finish her
6 examination. They talked to him about the commercial business
7 which is where this 2.7 case seems to have meandered by day
8 four. We have to have a full examination.

9 MR. DAHAN: I'm not saying you can't have a full
10 examination with him. He is going out of town. He is going
11 away. They are going away. He came in for Thursday. We
12 allowed Mr. Gibson to go first. He was supposed to be the
13 third witness because I knew he was going away.

14 MR. BROWN: I don't control it.

15 THE COURT: I mean I'm going -- we will do some quick
16 research on spousal privilege. How soon are you going getting
17 to that one?

18 MS. PECTOR: I mean I was planning to get on it
19 relatively soon, but I have other questions with this witness.

20 MR. DAHAN: You want to ask the questions, and we
21 reserve on it, and your Honor can strike it from the record.

22 MR. BROWN: If the Court would like to look at it --

23 THE COURT: No, you have represented what it is. We
24 are going to go through it.

25 MR. DAHAN: We will proceed. If your Honor wants to

K357HOR7

Benisti - cross

1 strike it, you can strike.

2 MR. MAROONEY: Let's do it that way.

3 (Continued on next page)

K357HOR7

Benisti - cross

1 (In open court)

2 THE COURT: Ms. Pector.

3 BY MS. PECTOR:

4 Q. Thank you. Mr. Benisti, when we left the record you we
5 were you talking about your support of Mr. Wiederman for five
6 years of the TLG relationship.

7 A. Did I what?

8 Q. Do you recall us talking when we left the record about your
9 support of Mr. Wiederman with respect to the TLG relationship
10 for a five year period which we heard about?

11 A. Yeah.

12 Q. So now, James, if we could pull up Exhibit 758 again.

13 And let's look, Mr. Benisti, at the performance of TLG
14 in terms of commissions that TLG was receiving during the
15 earnout period and how it increased. So if we can look at page
16 48 first, let's look at 2015 and see what TLG Holdings was
17 doing. Do you see there it's \$116,588.64?

18 A. Yes.

19 Q. And if we can go, James, to 216 -- sorry -- page 110.

20 Do you see that in 2016, page 110 --

21 Sorry. Do you see that in 2016 TLG Holdings increased
22 to \$135,704?

23 A. Yes.

24 Q. And if we could go to page 235, James.

25 And in 235, do you see how TLGC went up to \$402,360?

K357HOR7

Benisti - cross

1 A. Yes.

2 Q. And these are significant commissions, right, Mr. Benisti?

3 A. That TLGC is a different entity from what was before.

4 Q. And let's look at page 234. Don't they have the same
5 address, Mr. Benisti?

6 A. They do. They're different LLCs.

7 Q. Exact same address, correct?

8 A. Yes, but they look to be the same.

9 Q. Did you ever recall having communications with Mr. Sobel --
10 actually let me ask you this question. Do you ever recall
11 having communications with Mr. Shipper about whether or not you
12 were going to be giving TLG gifts?

13 A. Could be. It was the standard that during specifically
14 Jewish holiday we would send -- if we were sending out, so we
15 would send to some of the different brokers and then, yes, that
16 was probably a discussion I had with him.

17 Q. James, if you will pull up Exhibit 1079, page 123, pull up
18 that page.

19 This is a chat that you're having on the 3 Amigos chat
20 sight. Just to set foundation, is it correct that your 3
21 Amigos group chat was with David Sobel -- CFO of Major
22 Energy -- and Bruce Shipper who was your colleague in the
23 broker department?

24 A. Yeah.

25 Q. And in this particular exchange do you see that on December

K357HOR7

Benisti - cross

1 3, 2018 Bruce asks you a question: "Amir, you giving TLG, MMW,
2 EFWD?"

3 And actually this is in context -- if we go up to the
4 page just prior to this, James,

5 He is asking the question about whether or not you're
6 going to finalize your holidays gifts.

7 So if you go, Mr. Benisti, to the sixth from the
8 bottom line, do you see he is asking you the question: "Did
9 you ever finalize holidays gifts?"

10 A. I'm just going to read the beginning of that, this whole
11 thing, because I want to read from the beginning.

12 OK. Yes.

13 (Continued on next page)
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K35AHOR8ps

Benisti - Cross

1 Q. OK. We will go to the next page.

2 So now that you have the context, Mr. Benisti, do you
3 see that Mr. Shipper is asking you, "Amir, you giving TLG, MMW,
4 EFWD," holidays, right?

5 A. Yes.

6 Q. And "TLG," that's referring to the Mark Wiederman-related
7 broker, right?

8 A. I believe it's a brother, yeah.

9 Q. And when you say it's his brother, who are you referring
10 to?

11 A. He had a brother that's in the business.

12 Q. What's the brother's name?

13 A. I'm not sure.

14 Q. Did you ever ask who's his broker when taking care of a TLG
15 account?

16 A. An e-mail.

17 Q. Your communications about taking care of the TLG account
18 was with Mr. Wiederman, correct?

19 A. Not -- like I said, his brother had e-mail, different, you
20 know, hey, this is the guy I spoke to, you know, bumped into
21 him.

22 Q. But you can't tell this Court what his brother's name is?

23 A. If his -- I don't know if this was in the building,
24 nickname, Pinky, I'm not sure, whether it is Pinky or something
25 like that.

K35AHOR8ps

Benisti - Cross

1 Q. But you'll agree, Mr. Benisti, that he had several
2 communications with Mr. Wiederman about the TLG relationship
3 over a five-year period, correct?

4 A. Sure.

5 Q. Now he asked then, "Are you giving a gift to MMW?" That's
6 a separate broker account that Mark Wiederman had?

7 A. That is a joke. It's a joke. What's going on here, this
8 is a chat between Bruce Shipper, David Sobel, and myself. We
9 worked very hard together, and we liked to also have a good
10 time. So we had a chat. And a lot of the chat is just simple
11 back-and-forth on WhatsApp. This is not like I'm sitting here
12 brainstorming, where I'm sitting on WhatsApp.

13 Q. What does EFW relate to? Is that Mr. Wiederman's wife?

14 A. No.

15 Q. What does that relate to?

16 A. I have no idea.

17 Q. What do you mean when you say, "Doesn't TLG get a baby
18 gift?" Is that referring to another entity that's been spun
19 off from TLG?

20 A. I have no idea what that means.

21 Q. Those are your words, correct, Mister --

22 A. I don't know what is "TLG get a baby gift?" It would be a
23 joke. A baby gift? I'm not sure what a baby gift could have
24 been to TLG.

25 Q. OK. Well then, let's toggle up, James, if we could, to

K35AHOR8ps

Benisti - Cross

1 page 119. And just hold on before we put it up here. Let me
2 lay a little foundation.

3 Mr. Benisti, isn't it true that while you were working
4 for Major Energy during the earnout period, you were having
5 communications with Mr. Sobel and Mr. Shipper about trying to
6 start up a competing ESCO?

7 A. It was a thought. It was a thought.

8 Q. And this was more than a thought. You actually went out
9 and looked for investors, didn't you?

10 A. Investors actually have always come my way from the
11 beginning. Actually why I got a job at Major Energy was I
12 pitched Sofar with an idea, and he said, I like you, why don't
13 you come work for me. So I've always been an entrepreneur from
14 day one, and I think everyone should always being looking out
15 for themselves and trying to build the business best as
16 possible, so that's -- yeah.

17 Q. Mr. Benisti, in August of 2018, while you had full
18 responsibility for supporting the broker channel, you were in
19 parallel working on setting up a business that would compete
20 with Major Energy, with Mr. Sobel and Mr. Shipper, correct?

21 A. It was an idea. It was a thought. And I don't think,
22 especially if you ask the people behind you how they feel about
23 the industry and the regulations and where it's going, I don't
24 think it's -- the industry, the way it is right now, if you
25 were to not be forward-thinking, I don't think that -- opening

K35AHOR8ps

Benisti - Cross

1 an ESCO is not the brightest of ideas at this point. You're
2 just going to be another Major Energy.

3 Q. And that's because the regulations make it really difficult
4 right now to be able to grow business in this industry, right?

5 A. I'm not sure if that's accurate.

6 Q. All right. Well, let's look at your text message and see
7 if it is. Can you go to 119, James, and if we can look at the
8 bottom where it says "Amir." Let's just blow up the four on
9 the bottom.

10 So what we're looking at here, Mr. Benisti, is the
11 start of your Three Amigos chat. This is on August 28, 2018.
12 Do you remember having a chat about starting an ESCO with
13 Mr. Sobel and Mr. Shipper during this time period?

14 A. Yes.

15 Q. And specifically, you started off, and you say, "Bruce, how
16 many kilowatt hours do you think we can bring in monthly just
17 from broker network channels?"

18 Now, there, Mr. Benisti, you're not talking about
19 Major Energy; you're talking about this other business you're
20 trying to start up. Correct?

21 A. I'm asking in the broker network how many kilowatt hours
22 monthly would we be able to bring in.

23 Q. Then he goes on to say, "Key response depends on how LDC we
24 go into and depends on how competitive pricing is. Not saying
25 we need to be cheapest but close. If we stay in core New York,

K35AHOR8ps

Benisti - Cross

1 New Jersey area, maybe 2,000 RCE." And just to stop there for
2 a moment, is it true, Mr. Benisti, that when he refers to "core
3 New York and New Jersey areas," those are areas where Major
4 Energy does business?

5 A. Those are, I think, two of like the key United States
6 vendors.

7 Q. And in fact those are two of Major Energy's largest
8 markets, correct, Mr. Benisti?

9 A. I also believe, when he said "core" there, it also depends
10 on the context, so I just want the judge to also understand
11 that if he was, if I had to guess, probably referring to only
12 focusing on specific, like utilities, where there was like
13 really concentrated, you know, like certain people that he kind
14 of built up. That's probably what I would assume you're
15 looking at here, as opposed to not whole New York. I don't
16 think this is what this meant.

17 Q. Mr. Benisti, you know, from your tenure with Major Energy
18 over a seven-year period, as Mr. Dahan established, you know
19 that the largest market that Major Energy had was New York,
20 correct?

21 A. It is definitely a big part of our business.

22 Q. And in this instance you're now looking at creating
23 competing business to compete with Major Energy in New York,
24 correct?

25 A. We created a WhatsApp chat and our e-mail chain. I just

K35AHOR8ps

Benisti - Cross

1 want to, again, this was a WhatsApp chat. Hey, this is an
2 idea.

3 Q. Do you think that because it's a WhatsApp chat, it's any
4 different than if it's an e-mail? Is that the distinction
5 you're trying to make?

6 A. No. I'm trying to say this is like an idea. I'm an idea
7 person. I have even told him ideas when he was in the office.
8 I'm an ideas guy. I like to give ideas. And I decided to have
9 this chat and say, hey, it was cool. It was an idea. It never
10 got anywhere. It never got there.

11 MS. PECTOR: James, let's go to page 120. You can
12 blow everything up until the questions part. Just blow up the
13 top.

14 Q. OK. Now, here, Mr. Benisti, we're having a continuation of
15 the discussion. And the response from the prior question --
16 and let me just give you the context. Mr. Shipper says, "If we
17 stay in core New York, New Jersey area, maybe 2,000 RCE." And
18 then he responds, "Without TLG accounts," smiley face.

19 Now, in that context, that's referring to the
20 Wiederman account that we've been talking about, right?

21 A. Possibly.

22 Q. And you didn't want Mark Wiederman to be a part of the new
23 business, correct?

24 A. I don't know if I did not want. Yeah, probably not. I
25 don't know. It wasn't like anything was posed to him, and,

K35AHOR8ps

Benisti - Cross

1 hey, why not. It's an idea.

2 Q. Then Mr. Shipper says, "Low-income ruling took away many
3 residential RCEs," right?

4 A. Mm-hmm.

5 Q. And you are familiar that that happened and there was an
6 impact to Major Energy, right?

7 A. Yeah, I remember it happening.

8 Q. He then goes -- you go on to say, "OK, sounds good." David
9 Sobel responds, "So 20 million kilowatt hours per month, that's
10 good." And then he responds again, "Means we need to be in
11 NYISO and PJM." Right?

12 A. OK.

13 Q. And again, those are two markets that Major Energy is in,
14 right?

15 A. PJM covers, like, I think that -- it's -- OK. This was
16 very, like general, but, yeah.

17 Q. You then ask, "Bruce, now you're talking margins, you say,
18 Bruce, can we get that at 8 millions margins." And actually 8
19 million margins is higher than what you -- you priced out many
20 of the broker deals when you were working for Major Energy
21 during the earnout period, correct?

22 A. Yeah. In hindsight, you said, is it higher than what we
23 had priced out. So I believe our rack rates, I believe, had, I
24 think, I'm not sure exactly, but rack rates for custom price.
25 I was referring to a custom price, not a rack rate.

K35AHOR8ps

Benisti - Cross

1 Q. Then you respond back, I mean I think on the rack rates we
2 can." Right. That's you. And then Mr. Sobel says, "Can we
3 average 8 mils on 2,000 RCE or is it a lower number?"

4 And then if we look down, you say, "I'm setting up my
5 hookah and laptop soon. I'm ready to start putting topics of
6 discussions for tomorrow meeting."

7 And here, Mr. Benisti, you're getting ready to prepare
8 a business plan. Right?

9 A. But that would normally be the paper probably. I don't --

10 Q. Mr. Shipper responds, "Remember, it takes time to build up
11 to that level. Because of the relationships we have, I believe
12 we can get there, but not immediately. Brokers will be weary
13 of a new supplier and will go slowly with us. That's why it's
14 important to nail down operations so no mistakes happen." Did
15 I read that correctly?

16 A. Yes.

17 Q. Now, at this point in time, Mr. Benisti, the plan of you,
18 Mr. Shipper, and Mr. Sobel is, once this company is up and
19 running, to take the broker relationship that you have from
20 Major Energy and use those for your new business. Correct?

21 A. It -- I mean, if I would bill a new job somewhere else,
22 this is an ESCO, it's something that I believe even my
23 employment agreement allows me to -- definitely, if I went and
24 opened an ESCO or decided to go work for an ESCO, I was able to
25 do the exact same thing that I was able to do at Major Energy.

K35AHOR8ps

Benisti - Cross

1 That was in my employment agreement, per my understanding.

2 Q. Is it your testimony that you had an employment agreement
3 with Major Energy?

4 A. I had -- I believe I had one, yes.

5 Q. Did you know that you had a fiduciary duty to Major Energy?

6 A. Yes. I think so. I didn't read through the whole entire
7 thing. And yeah, I remember when we were discussing the IT
8 changes, whatever changes he did, I told him I have those
9 changes in mind.

10 Q. Did you understand that you had a duty not to interfere
11 with Major Energy's relationships?

12 A. At what point?

13 Q. At any point.

14 A. I don't know.

15 Q. Did you understand, Mr. Benisti, that you have a duty not
16 to interfere with Major Energy's business relationships?

17 A. Meaning after I leave?

18 Q. Any time. While you're an employee, after you leave, did
19 you understand that you had a duty not to use their
20 confidential information or their relationships to interfere
21 with their business?

22 A. I think so.

23 Q. I'm sorry?

24 A. Yeah, I think so.

25 Q. OK. So in this particular instance, what you're doing is,

K35AHOR8ps

Benisti - Cross

1 you're planning, with the knowledge you have of the brokers
2 that Major Energy has and the relationships they have, the
3 money that they're spending, you're at this point planning to
4 divert those broker relationships to a company that you're
5 thinking about starting up. Correct?

6 A. It was both, yeah. Definitely. It was, again, a -- I
7 don't know. I mean, it was -- again, this was -- I don't think
8 we're out a few weeks. We just chatted back and forth about
9 it.

10 Q. Well, it goes on to say, you may, "I agree. But I feel
11 like they trust us and if we tell them we have it pat down, we
12 are ready to rumble. The more I think about it, the more I
13 think that having an IT guy build a system makes more sense
14 than outsourcing the system." Mr. Shipper then says, "Well, to
15 start off, I would think closer to 500 to 750 RCE months, 1-4,
16 5-8, we should be able to get 1,000 RCEs. Probably closer to
17 year's end we should be able to get to 2,000 RCE."

18 And then he goes on to say, "Believe we will likely
19 average 5-6 millions or small to mid size commercial. Large
20 commercial is probably 3-4 million if you want to win that
21 business."

22 He says, "I need to understand the supply part of it
23 some more. Levy was so secretive about it. Need to understand
24 the risk part. We also need to pass through the regulatory
25 changes so we don't lose significant money." Did I read that

K35AHOR8ps

Benisti - Cross

1 correctly?

2 A. Yes.

3 Q. And you respond, "We will always reserve that right."

4 A. Yes.

5 Q. OK. Now, this chat continues on for a while, Mr. Benisti.

6 But if we just jump forward --

7 MS. PECTOR: James, will you go to page 121.

8 Q. On page 121, James, if we blow up the bottom half of this,
9 do you recall, Mr. Benisti, you're talking back and forth about
10 the specific brokers, but if we look at your entry at 7:32
11 p.m., you say -- there's a question of, "Do we have funding
12 yet?" And your answer is, "We definitely have the right people
13 interested, so now we need a business plan and I believe we're
14 good from there in regards to funding." Bruce Shipper then
15 responds, "We need good answers to how we are going to be
16 different than the others? Got to work on that answer." And
17 he says, "My answer is that there are so many suppliers being
18 brought out and consolidated into other companies, brokers need
19 a broker-friendly company, and with our over 400 broker
20 relationships, we can step in and make huge waves in the
21 industry." Did I read that correctly, Mr. Benisti?

22 A. I think so.

23 Q. And if we toggle down, your response to this, to what
24 Mr. Shipper is saying, is, "That's a key response." Right?

25 A. Yes.

K35AHOR8ps

Benisti - Cross

1 Q. So you're not -- at no time in this time are you saying,
2 hey, Bruce, it's wrong that we are doing this to Major Energy,
3 we shouldn't be thinking about the diverting away the 400
4 broker relationships. Instead, you continue on with the
5 conversation and spend time and energy trying to make plans to
6 set up a business. Correct?

7 A. Right. I just want to point out, like I mentioned, earlier
8 I think it was -- brokers don't just terminate an agreement. I
9 don't think any broker would have terminated an energy
10 agreement with me. It's just that Major Energy had gotten, at
11 that point thus far, had totally destroyed the relationships
12 that the brokers had with Major Energy and Spark had destroyed
13 a lot of what we had done the work to build. This is my idea
14 of saying, let's go back out there and do something where the
15 brokers want to and, you know, grow the business.

16 Q. Mr. Benisti, how could you say that Spark destroyed what
17 Major Energy built when you were able to keep your
18 relationships with over 400 brokers during the earnout period
19 after the dropdown?

20 A. Like I mentioned before, when I say out there, that there's
21 400 broker relationships, we would consider 400, like we would
22 say 400 relationships as in the broker codes in our system, and
23 we have like probably at midpoint 450. So actually that's what
24 we call a 4A relationship. It wasn't a first relationship like
25 I had mentioned before where, you know, I had a personal

K35AHOR8ps

Benisti - Cross

1 relationship with like 30, 40, that I could call up and say hey
2 what's up.

3 Q. Well, Mr. Benisti, this wasn't the only business that you
4 tried to start up during the earnout period while you were
5 working for Major Energy, correct?

6 A. At least, I mean, may -- again, my thoughts are a little --
7 it could be. I just wanted to --

8 Q. Well, you also tried to start up a car leasing business
9 with Sunil Gadtaula, who is the lead vendor in this case that
10 sellers are claiming Spark interfered with. Isn't that true?

11 A. Yeah. Actually, I thought it was a pretty cool idea to be
12 able to couple together a couple different options and that
13 would, you know, give a lot of value to him. He'd be able to
14 sell different rights, I guess like the energy contract, and
15 also different things like signing an energy contract and also
16 like a car lease contract. But that never went anywhere. And
17 it was, again, just a thought and an idea.

18 Q. Well, Sunil Gadtaula was not the only one involved in that
19 thought and idea. Sam Bensinger was as well, correct?

20 A. Correct.

21 Q. And Sam Bensinger was an employee working for Major Energy
22 during the earnout period, correct?

23 A. Yes.

24 Q. And Sam Bensinger was responsible for marketing efforts and
25 bringing in business for Major Energy to help growth, correct?

K35AHOR8ps

Benisti - Cross

1 A. I'm not sure what his specific responsibility was, but --

2 Q. Well, you will agree that when Mr. Bensinger was spending
3 time either helping you with your car leasing idea or helping
4 Meretz bring in business, he wasn't working for Major Energy
5 during that time period, correct?

6 A. I just want to, since we're all engaged here, these are
7 ideas, and this happened at 7:32 p.m. and late at night.
8 Again, these are off the top of my head. I get ideas. And,
9 like I told you, I even mention ideas when he was in the
10 office. I'm an ideas kind of guy. I don't see that I, you
11 know, if this was -- ideas that I've spoken to with people who
12 I worked with. I got very close to people that I worked with.
13 I had relationships with people that I worked with.

14 MS. PECTOR: James, let's turn to, the same exhibit,
15 page 97. And if we could blow up the last ten lines, page 97.
16 Yes, that's good.

17 Q. So now, here is a series of chats between you and Sam
18 Bensinger. Do you see that, Mr. Benisti?

19 A. Yes.

20 Q. And these chats are -- I want to start with the one at
21 5/11/2017. Do you see that one?

22 A. Yes.

23 Q. And you agree, Mr. Benisti, that this is during the earnout
24 period. This is in fact year two of the earnout period May 11,
25 2017. Right?

K35AHOR8ps

Benisti - Cross

1 A. Yes.

2 Q. You're having a communication with Sam Bensinger, who is
3 working for Major Energy at the time. "When are we web-opening
4 our LLC?" Did I read that correctly?

5 A. I'm not sure what "web-opening" is, but yeah. You read it
6 correctly. I don't know what --

7 Q. That's your message to Sam, right?

8 A. Yes.

9 THE COURT: It probably meant "when are we opening our
10 LLC"?

11 THE WITNESS: Oh, OK.

12 Q. You say, "We also need to reach out to some car dealers.
13 SAS. Leasing. Let's work on it."

14 Sam responds, "Should be cheap. Depending on the
15 corporation. LLC is more expensive. We'll research."

16 And then you say, "Tomorrow after Mincha, we'll ride
17 out to a meeting with Pinky. I have a meeting tomorrow. One
18 sec."

19 MS. PECTOR: Can we go to the next page, James.

20 Q. And then there is a series of exchanges about meetings.
21 And then it culminates in, if I can continue on, "Want to hit
22 up the bar? Did you get enough drinking? Passing out. Try
23 MW." Is that referring to Mark Wiederman?

24 A. Probably.

25 Q. "LOL. I'm sure he's going to be asleep. I'm so tired.

K35AHOR8ps

Benisti - Cross

1 Wanted to check out of the hotel. I'll go for a quick walk
2 around. Snap. Hells no. You here."

3 Is this an example, Mr. Benisti, of a time when you're
4 on a trip with Mark Wiederman and Sam Bensinger that was one of
5 the trips that were taken from time to time with brokers on
6 Major Energy company funds?

7 A. I don't recall any of this. I see it, obviously, but I
8 don't know like where is this. I guess, it says "hotel," yes.

9 Q. Well, it is true, sir, isn't it, that you had traveled with
10 Sam Bensinger and Mark Wiederman and David Sobel for trips paid
11 by Major Energy under the auspice that you were entertaining
12 brokers, correct?

13 A. I think most of the brokers came with us. Maybe he came
14 with a few. I don't know. But for the most part, this broker,
15 it was probably just me or Bruce Shipper. Maybe later on he
16 accompanied me. But there were some trips where they would
17 take me and one or two brokers. I don't recall.

18 Q. So are you saying there wouldn't be a business reason for
19 you to be going on a trip with Mark Wiederman and David Sobel
20 for business-related purposes that were being expensed to a
21 company credit card?

22 A. So like I said, sometimes if they were going to go
23 somewhere, I would think that, if they were going, I would take
24 one or two brokers with me, sometimes.

25 Q. Well, let's just scroll forward.

K35AHOR8ps

Benisti - Cross

1 MS. PECTOR: James, if we can go to the bottom of this
2 e-mail, the last 15 lines.

3 Q. Now, here we're still talking about the same thing, but I
4 just want to fast-forward because you can see that Sunil is
5 involved in this business venture. Do you see towards the
6 bottom, "Amir, please give Megan the two Knicks draft tickets
7 to leave up front. Sunil is sending someone to pick it up at
8 11. Thanks. OK. Yo, can you talk tonight?"

9 And then he responds, "Tomorrow, traveling. Be in the
10 office. We are waiting time."

11 And then he responds, "Sealed Sunil today. Can you
12 talk to Sunil about using the PTM name? No. He will love it,
13 and it's already branded, selling for us. We'll make another
14 name."

15 So now let me stop there for a moment, Mr. Benisti,
16 because here, you and Mr. Bensinger have already gone and
17 talked to Sunil about working with you guys as a partner in
18 this car leasing business, correct?

19 A. I don't think I ever went to talk to him about it. Maybe
20 Sam had and I also -- you know, I don't know if you ever met
21 Sam. He -- this is the way he talks. He's a very, you know,
22 sarcastic, quick on -- you know, I don't even know what "sealed
23 Sunil today" would mean.

24 Q. Well, you agree that in this text message what you and he
25 are discussing is, well, we'll bring Sunil in, but since the

K35AHOR8ps

Benisti - Cross

1 PTM name is already being used by Major Energy, we'll have
2 Sunil set up another company name and we can use that to help
3 our new business. Right?

4 A. I don't think that's what it means, no. Like I mentioned
5 earlier, this was an idea and I've had plenty of different
6 ideas that I thought would have made Major Energy, you know,
7 like kind of had -- dealer unique than other ESCOs. So this
8 was one of my ideas where I had mentioned to him where he can
9 sell a Major Energy contract or whatever he was selling as, you
10 know, a residential, you know, contract, and also, you know,
11 because they're in this mix of, hey, we have an energy contact,
12 you can also get like a car lease. I mean, I never even spoke
13 up. I don't recall ever calling any car leases. Again, this
14 was an idea.

15 Q. Mr. Benisti you knew that at some point in time, PTM had an
16 exclusive relationship with Major Energy, correct?

17 A. I didn't know.

18 Q. You did not know that.

19 A. I did not know that. I don't think so.

20 Q. Let's go to page -- you will agree, though, Mr. Benisti,
21 that by creating other opportunities for Sunil to work in and
22 spend his time when he was working on time with your business
23 venture, he's not working on sales for Major Energy, correct?

24 MR. DAHAN: Objection to form. How could he know what
25 Sunil's time management is?

K35AHOR8ps

Benisti - Cross

1 THE COURT: You can answer if you know.

2 A. Sunil was not out there on the road. I don't think it
3 would -- yes. I don't think it was any different at all.

4 Q. Let's just move forward, Mr. Benisti, and see how much you
5 offered Sunil in terms of an ownership interest.

6 MS. PECTOR: So, James, we'll go to page 99. And if
7 we can blow up the text starting at 9:06 p.m. Just blow that
8 up all the way down to the end if you could.

9 Q. All right. So now, Mr. Benisti, fast-forward. You're
10 still having discussions about the same topic, in July of 2017.
11 And you would agree that it's still during the earnout period.
12 Right?

13 A. Mm-hmm.

14 Q. OK. And if I could turn your attention to the entry
15 starting at 9:06 p.m. at the top, this is now a message from
16 you. "Been thinking. I think we should tell Sunil we will
17 give him 10 percent plus sales and 15 percent to use the TPM
18 brand name. He already has a following and a brand name. We
19 can discuss on Wednesday."

20 And then you respond, "I made some more calls getting
21 a bunch of information. We are going to kill it. It's going
22 to be huge. We need to take a day off next week and call each
23 of these dealers again and make deals with them." Do you see
24 that, Mr. Benisti?

25 A. Yes.

K35AHOR8ps

Benisti - Cross

1 Q. Does that refresh your memory that in fact you were making
2 an offer to Sunil to give him 10 percent of all sales and 15
3 percent to use his PTM name for your new business?

4 A. That's what it says there. Again, this is off the top of
5 my head.

6 Q. And this was something that you kept a secret from Spark
7 and NGE, correct?

8 A. This is an -- I think you're taking it in a very
9 interesting way. This is -- we don't know each other
10 personally at all, and if we did, we would not be reading these
11 text messages like this. And I think if I -- people who know
12 me would put that and say, oh, Amir, this is another business
13 you want to start? Just, you know, stick to what you're doing,
14 you're -- you know. I've always wanted to start businesses.
15 I -- something that I always wanted to do. So, again, you
16 don't know me, right, so you're looking at a bunch of letters.
17 And this is literally like ideas that went nowhere.

18 Q. Would you agree, Mr. Benisti, that Mr. Bensinger was
19 somewhat of a handler for Mr. Gadtaula?

20 MR. DAHAN: Objection to form.

21 Q. He was taking care of that relationship.

22 A. They were very close, yeah.

23 Q. I'm sorry?

24 A. They were very close, I believe. And he definitely had
25 that relationship, especially when he already left, I think.

K35AHOR8ps

Benisti - Cross

1 Q. And if we look at his entry at 4:50 p.m., do you see where
2 he says to you, "Stop blowing up our partner, LOL, keep what
3 you see between us, no one from the office. Thank you." And
4 then you say, "100 percent. I don't share anything," with a
5 thumbs up. Did I read that correctly?

6 A. Yeah.

7 Q. So is it fair to say that you kept this from everybody in
8 the office, correct?

9 A. That was probably -- again, you -- Sam, I could tell you,
10 just looked at it the way he was writing it, "stop blowing up
11 our partner." I mean, he's not a partner. He was not my
12 partner and never has been my partner. This was an idea of
13 potentially being able to have PTM sell other products, right,
14 that eventually would have, you know, made a deal.

15 Q. Mr. Benisti, I want to talk to you again about Meretz. And
16 specifically what I want to talk to you about Meretz about, do
17 you remember Meretz taking advances from Major Energy before
18 commissions were in fact received?

19 A. There was a time where I believe it got an advance. I
20 don't know what you mean by "before commission was received."

21 Q. Well, what I mean by that -- and thank you for asking me to
22 clarify. What I mean by that, was there a point in time when
23 you were talking to Mr. Sobel about finding a way where you
24 could get money from the company as an advance through Meretz,
25 even though Meretz had not generated the money yet to get those

K35AHOR8ps

Benisti - Cross

1 commissions, generated sufficient money to get those
2 commissions?

3 A. That's not accurate. Meretz had commissions coming in,
4 being paid out monthly. So I don't know what you mean by
5 saying that they -- this is up front, before they made a
6 commission? I don't understand that.

7 Q. OK. Well, first what I want to do, Mr. Benisti, is take
8 you to --

9 MS. PECTOR: James, page 55.

10 THE COURT: Just for the court reporter, Meretz is
11 M-e-r-e-t-z, is that right?

12 THE WITNESS: Yes.

13 MS. PECTOR: OK, so page 55.

14 Your Honor, just so the Court is aware, this is what I
15 said for the Court earlier is redacted images, so that's the
16 only reason why I said it was redacted.

17 Q. Now, here you're having a discussion with Mr. Sobel, and
18 this is on July 20, 2018. Do you see that, Mr. Benisti?

19 A. Yeah.

20 Q. And again this is during the earnout period, correct?

21 A. Yeah.

22 Q. And do you see that there is an entry at 2:15, p.m., that
23 is an incoming message from Mr. Sobel in response to a voice
24 recording that you sent him, right?

25 A. Yes.

K35AHOR8ps

Benisti - Cross

1 MS. PECTOR: James, could you play Mr. Benisti his
2 voice recording, which is 69F3.

3 (Audio recording played)

4 Q. All right. So in that voice recording, Mr. Benisti, you
5 were asking Mr. Sobel, who was the CFO of Major Energy at the
6 time, if he could help you set up an arrangement where you
7 could essentially get a loan out of Major Energy, under the
8 pretense that Meretz, the company I think you testified here
9 you weren't involved in, could get an advance. Is that right?

10 A. Let me just explain to the judge after -- everything that
11 you just said was very much out of the context, OK? When we
12 were buying our house, which was in 2018 around noontime, the
13 mortgage broker had told us that if I was able to come up with,
14 I think another \$10,000, I was able to take out something
15 called -- basically it was like a PMI meeting, which is like a
16 fee that you would pay if you're buying -- if you take a
17 mortgage which was less than 20 percent of the house value. So
18 I wasn't sure, you know, what to do. And I had spoken to, you
19 know -- well, actually, I think me and Nicole had spoken to
20 Meretz a week in advance, I want to see if maybe Meretz was --
21 will lend Nicole, you know, \$12,000.

22 THE COURT: Nicole is your wife.

23 THE WITNESS: Yes.

24 THE COURT: And this is asking about Meretz lending
25 Nicole.

K35AHOR8ps

Benisti - Cross

1 THE WITNESS: Yeah. So I always and regularly spoke
2 to David Sobel about finances. I'm not a finance guy. And I
3 wanted to understand if, you know, that money was advanced from
4 Major Energy into Meretz and Meretz is going to lend me that
5 loan, it was not a Major Energy loan. That was Meretz loaning
6 it to me. Right. So that's where it is. I don't know. It's
7 totally out of context. I'm sorry.

8 Q. Did you sign a loan agreement with Major Energy setting
9 forth the terms on which you would pay back the loan,
10 Mr. Benisti?

11 A. No.

12 Q. This was just a side deal that you and Mr. Sobel had?

13 A. I didn't take any money from Major.

14 Q. Let's look at Mr. Sobel's response to you.

15 MS. PECTOR: James, if we could go to the response at
16 2:15.

17 Q. Do you see, David Sobel responds, "That, I believe, is what
18 I was suggesting first, but then you had the better idea of
19 just of taking just the \$9600 now. You can take the 12K now
20 and then next month, if Meretz earns 4K but only gets 3K,
21 you'll get 80 percent of 4K equals 3200, but then pay back the
22 1K to Meretz so you end up with 2200 and Meretz has the other
23 800. Makes sense?"

24 Did I read that correctly, Mr. Benisti?

25 A. That -- this was, again, me asking David Sobel, right, that

K35AHOR8ps

Benisti - Cross

1 if I were going to get money, that Meretz was going to loan to
2 us, I would -- I had to, I think it was like one, 20 percent of
3 it or something, so this way he was going to give it up front
4 money, right. And then I would pay 20 percent. So instead
5 of -- I was trying to figure out how to get that money back to
6 Meretz, with them keeping the 20 percent.

7 So, again, I was going to get money from Meretz alone
8 and they were getting -- they were holding on to 20 percent of
9 it.

10 Q. Well, in the end, at 2:27 p.m. on that same string,
11 Mr. Sobel responds, "The 12K might make more sense, and that
12 was my first thought, as that is what you wanted to borrow, so
13 why leave money in Meretz. However, that's your call," smiley
14 face.

15 And you responded to him, "I hear you." He says,
16 "That's your call." And you said, "I hear you." Right?

17 A. Again, I asked him for like the -- as the person who was
18 going to stand by.

19 Q. Now, Mr. Benisti, you've taken the position in this case
20 that you were not affiliated with Meretz, is that correct?

21 A. My wife was working at Meretz.

22 Q. Only your wife, correct?

23 A. And I was working -- and needed help. And if there was
24 anything I could help her with, I would help her with it, yeah.

25 Q. Do you remember hiring somebody on the IT side to help make

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Benisti - Cross

1 you feel secure that you would work on a Meretz computer while
2 you were at Major Energy without anybody being able to see that
3 you were accessing Major Energy's Wi-Fi on a Meretz computer?

4 A. I don't recall that.

5 MS. PECTOR: All right, James. If you could go to
6 page 74.

7 THE COURT: By the way, what exhibit is this again?

8 MS. PECTOR: I'm sorry, your Honor. This is Exhibit
9 1079.

10 THE COURT: 1079.

11 MS. PECTOR: Yes, your Honor.

12 THE COURT: This is all on 1079.

13 MS. PECTOR: Yes, your Honor.

14 If we could go to page 74, and, James, if you could
15 take it all down. Very good.

16 Q. OK. Now, here, Mr. Benisti, you're talking to Moshe Cohen.
17 Who's that?

18 A. Moshe Cohen. Let me see. High school --

19 Q. Do you see at 12:25 p.m. you send an outgoing message,
20 Amir@MeretzEnergy.com, correct?

21 A. Right.

22 Q. And again you're working for Major Energy during this time
23 period?

24 A. Yes. Just, again, this is a lot of out of context stuff
25 here.

K35AHOR8ps

Benisti - Cross

1 THE COURT: Just do your best to answer the question.

2 THE WITNESS: OK.

3 A. I mean, this is -- yes, between me and Moshe.

4 Q. Well, you're not talking to your wife in this?

5 A. Yes.

6 Q. Let's go on to see what your concern was that you're
7 expressing, because then we fast-forward to July of 2017, again
8 in the earnout period. Do you have having discussions with
9 Moshe Levine?

10 A. Mm-hmm, yes.

11 Q. Who is Moshe Levine?

12 A. Somebody I was in school with.

13 Q. And does Moshe Levine have an IT background?

14 A. He is a -- he is software developer right now. He's in
15 software.

16 Q. So he's somebody that you were going to for the subject
17 matter that we see. Right?

18 A. As a friend, yeah, I asked him a question.

19 Q. Let's look at the question you ask him. 11:35, you ask
20 him, "If I'm going to connect to Major Energy Wi-Fi using my
21 Meretz computer, can they see anything?"

22 His response, "Assuming your firewall is on and you
23 only go onto secure web pages, you should be fine." He says,
24 "by secure, I mean if you're using Chrome, is doing the HTTPS,"
25 and then he provides you with the rest of a website, it looks

K35AHOR8ps

Benisti - Cross

1 like, right?

2 A. Mm-hmm, yes.

3 Q. And you respond -- you want more clarification. "No. I
4 mean, can my work see that I am using a laptop and using
5 Outlook that is a Meretz Outlook?" Did I read that correctly,
6 Mr. Benisti?

7 A. Yeah.

8 Q. And he responds, "No, they can't." And you say, "OK,
9 cool." That's a message that you sent on July 7, 2017 during
10 the earnout period, correct?

11 A. Correct.

12 Q. And that's because you were working for Meretz while you
13 were at Major Energy and you wanted to be sure that people
14 couldn't see what you were doing in Major Energy's offices on a
15 separate computer, right?

16 A. Can I -- can I explain what's behind? Again, there's a lot
17 of context that's not here.

18 THE COURT: Well, does it mean what it says or not?

19 THE WITNESS: It's -- yeah. I mean, I guess it means
20 it was -- I guess it can be what it says.

21 THE COURT: OK.

22 Q. All right. Well, do you remember, Mr. Benisti,
23 specifically having opportunities where you were talking to
24 people who could have been sending potential customers to Major
25 Energy, and you were directing them away from Major Energy to

K35AHOR8ps

Benisti - Cross

1 Meretz so that you could outsource them to another supplier?

2 A. So I had an agreement with previous management that if
3 there was a client that I had -- which was not a lot, it was
4 only a handful of clients -- that I couldn't sell them to Major
5 Energy without -- it was too high a risk that client saying,
6 oh, I know he's too high, don't give it, or, you know, lose
7 credibility with his -- with the other account, then we would
8 price that account through Meretz so that this way we know that
9 the customer is getting the cheapest rates across the board.
10 They wouldn't question us with the accounts that are, you know,
11 maybe weren't the cheapest if they weren't with -- if they were
12 with Major.

13 Q. So you're saying that actually Major Energy, during the
14 earnout period, knew that you were using Meretz to take
15 customers and price them more cheaply with other suppliers? Is
16 that what you just said?

17 MR. DAHAN: Objection to form. That's not what he
18 testified.

19 THE COURT: You can answer to the extent you want to
20 explain.

21 A. Can you ask --

22 Q. Yes. I believe you just testified that somebody definitely
23 knew about this, right?

24 A. There was one that I had spoke to.

25 Q. And that one that you spoke to was Mark Wiederman, correct?

K35AHOR8ps

Benisti - Cross

1 A. I'm not sure if it was either him or someone else, but --

2 Q. Mr. Benisti, isn't it true that when Mark Wiederman found
3 out that you were working with Meretz, that he wanted in on it
4 and he was looking at buying Meretz?

5 A. I think he even -- he even spoke about it. He wanted to
6 have a brokerage in-house, like I explained before. And my
7 original testimony was that when a customer or a client or some
8 of the smaller brokers, if they can't get back to their
9 customer with a good, competitive, cheap rate, it loses
10 credibility with the customer. We had to be able to offer them
11 a cheaper rate at a time where, if Major wasn't -- if we
12 were -- if we were going to give them a Major rate where it
13 wasn't the cheapest, again, it loses credibility. We were
14 trying to avoid that.

15 Q. Well, the person who was in control of giving a cheaper
16 rate was Mark Wiederman, who was the president of the Major
17 Energy during the earnout period, correct?

18 A. In control of what?

19 Q. If Mark Wiederman, as the president of Major Energy, wanted
20 to give a lower rate to a broker to be able to, as you say,
21 maintain credibility in the relationship, he could have done
22 that, right, Mr. Benisti?

23 A. I don't think so, because there was, you know, that -- we
24 know that was something that you couldn't do. That was
25 something that we spoke about because that was something that

K35AHOR8ps

Benisti - Cross

1 Spark would not allow us anymore. We previously had done that.
2 But now that we weren't able to no more go out there, if a
3 customer has ten accounts that you're not the cheapest on, if
4 he now realizes you're not the cheapest, he's going to start
5 second-guessing you on all your other accounts. You need to be
6 prepared to give him pricing at the cheapest in case he's, you
7 know, looking into that price right now. And if you don't give
8 him the rate that's the cheapest, you risk losing his other
9 business.

10 Q. OK. Well, let's look at some examples of you getting
11 opportunities for business and not booking those opportunities
12 with Major Energy, OK? Do you recall that happening?

13 A. Possible. Why not? I don't think I was doing that. But
14 maybe, you know, on a case-by-case basis.

15 Q. Well, let's look at page 72, same document, and let's look
16 at the communications with Evan Gervis, if you could just blow
17 up the bottom here, James.

18 Now, who was Evan Gervis?

19 A. He's also a friend of mine.

20 Q. He's a friend of yours who would bring you business
21 opportunities in terms of customers that were looking for
22 electricity and gas supply, right?

23 A. No. I think -- he just -- he owns some of those different
24 properties.

25 Q. Let's see what he's asking you. This is on August 2, 2017.

K35AHOR8ps

Benisti - Cross

1 Again, we're in the earnout period, correct?

2 A. Mm-hmm.

3 Q. And he said, "Hey Amir, any update re electric rates?" And
4 your response is, "Shoots, I was supposed to call you. When
5 can we talk?" He says "I'm available for the next 20 minutes."

6 "OK, call a few." "OK."

7 "And then you say, "Hi Evan, you're in contract for
8 0829 and they are adding 0515, which brings us up to .08805."

9 Did I read that correctly?

10 A. Yes.

11 Q. And so you're specifically talking to him about the
12 contract he's in and the pricing, right?

13 A. That was, I think, the contract.

14 MS. PECTOR: And if we can go to the next page. I'm
15 sorry, James, page 72.

16 Q. Was he a broker for Major at the time?

17 A. No.

18 MS. PECTOR: If we go to the top of 73, James. And
19 let's just blow up the first ten lines.

20 Q. And then you are responding providing the pricing, correct?
21 And you tell him, "Evan, I can get you as follows." You give
22 him a 12-month rate, an 18-month rate, and a 24-month rate,
23 right?

24 A. Yes.

25 Q. And you say, "And I can start the rate in September,"

K35AHOR8ps

Benisti - Cross

1 correct?

2 A. Yes.

3 Q. His question back to you, "With Major?" And he says,
4 "Let's do 24 months as I can always cancel," smiley face.

5 And your response, Mr. Benisti, "LOL, this one isn't
6 with Major. Ha ha. This one we would need to stick to."

7 Is that an example, Mr. Benisti, of you having
8 somebody come to you for electricity and gas pricing, while
9 you're working with Major Energy during the earnout period, and
10 you're offering him alternative pricing for another supplier?

11 A. So as I mentioned just before, Evan had multiple different
12 properties. I'm not sure which property this one is referring
13 to. But if I were not going to get him the cheapest price,
14 that, again, opens up the risk of him looking into the other
15 properties that we currently have and possibly losing that.

16 Q. So this is an example, Mr. Benisti, of an opportunity you
17 steered away from Major Energy, correct?

18 MR. DAHAN: Mischaracterizes the testimony, your
19 Honor.

20 THE COURT: You can move on.

21 MS. PECTOR: OK.

22 Q. Now, Mr. Benisti, it wasn't just the discussion with
23 Mr. Gervis where you looked at diverting opportunities away
24 from Major Energy, correct?

25 A. I'm sorry?

K35AHOR8ps

Benisti - Cross

1 Q. This wasn't the only time that you looked at sending
2 customers to a supplier other than Major Energy while you were
3 employed by Major Energy, correct?

4 A. Possible.

5 Q. All right. Do you remember having discussions with your
6 wife about that while she was working for Meretz?

7 THE COURT: Well, with respect to marital
8 communication, the research we've done, although I initially
9 thought a spousal privilege would apply, actually, under New
10 York law -- since this is a diversity case, the privilege is
11 governed by New York law. And the law is, as indicated by the
12 case *G-Fours v. Miele*, 496 F. Supp. 809, that there's an
13 ordinary business matters exception to the marital
14 communications privilege. So that to the extent that
15 communications that are spousal communications are familial
16 business matters, there's an exemption for marital privilege.
17 So if there's a truly a business, then there's an exception to
18 the marital privilege; it can come in. However, I'm going to
19 allow the testimony subject to the plaintiffs's objection and
20 I'll consider a motion to exclude this. But I'm going to allow
21 the testimony provisionally.

22 MS. PECTOR: Thank you, your Honor.

23 James, if we can pull up page 77. And if you'll start
24 off, first, with the bottom 20 lines.

25 Q. Now, Mr. Benisti, I want to turn your attention to the

K35AHOR8ps

Benisti - Cross

1 communication that you're having, and it says "Nicole, my
2 love." That's your wife, Nicole Benisti, correct?

3 A. Yes.

4 Q. And she was working for Major Energy -- I mean Meretz, at
5 the time, correct?

6 A. Yes.

7 Q. And Meretz was a broker of Major Energy at this time,
8 correct?

9 A. Yes.

10 Q. And Major Energy was paying Meretz a brokerage fee for the
11 work that she was doing, correct?

12 A. Yes.

13 Q. And the work that she has been doing involved finding
14 pricing for customers and putting them with certain suppliers,
15 and in exchange, if she could place those customers, a
16 commission would be given to her, right?

17 A. I'm not understanding the question.

18 Q. If your wife could place customers with the supplier, she
19 would get a commission, correct?

20 A. I believe that's -- there is --

21 Q. Let me give an example of her reaching out to you. Here we
22 are looking at August 8, 2017, 10:55 a.m. And she asks you,
23 "Sending Simchis RFP to Major?" And you respond, "We will get
24 you a new one. Simchi don't send to Major," thumbs up. Did I
25 read that correctly?

K35AHOR8ps

Benisti - Cross

1 A. Yes, because an RFP is a request for price, which is what I
2 explained earlier. All these deals -- not all, but the deals
3 that I personally was working on, those are my better clients.
4 I was pressing it internally with Major. I didn't see a point
5 to have her send it in.

6 Q. Well, you don't say that here.

7 A. Well, you also don't mention that there is -- I went
8 through this, and there's stuff in here that I told my wife,
9 "send it to Major," and you didn't put that in there either.

10 Q. Well, let's look at another communication, Mr. Benisti.
11 Let's look at page 79.

12 MS. PECTOR: And, James, you can just blow up the
13 first 25 lines.

14 Q. OK. So here we're talking about the entry starts with
15 "Rockefeller -- start date?" Which is an incoming message from
16 her to you. "Did December start, sent to everyone on the list
17 besides Major and" -- was that Agara? "Well request a refresh
18 tomorrow or Thursday."

19 And then you respond, "I understand your frustration.
20 It's very hard for me to be the sales guy and at the same time
21 work at Major. I am working on getting Sunil to get his stuff
22 together so we can start work" -- what are you referring to
23 there? The other business that Sunil was starting up?

24 A. I have no idea what I was referring to.

25 Q. And then you say, "By the way, can you send out the Danza

K35AHOR8ps

Benisti - Cross

1 lesser gas today?"

2 And then you follow up with, "Don't send to Major."

3 Do you see that?

4 A. Yeah. We were pricing that deal. I was pricing that deal
5 directly at Major. And for that matter, yes, I don't even know
6 if that might have been my deal. That might have been one of
7 other salespeople I have no idea.

8 Q. All right. Well, what we see in this communication is you
9 telling her not to send that deal to Major, right?

10 A. Yeah. Like I said --

11 Q. Now let's look at another example. 87. If we could look
12 at page 87, the bottom of the page, just blow up the last five
13 lines, James.

14 Now, this is an outgoing message from you on November
15 2, 2018. You'll agree, Mr. Benisti, this is still during the
16 earnout period, correct?

17 A. I believe so, yeah.

18 Q. And you're telling her, "Just finished up. Closing down
19 a.m." And you send a message, "Did Channa send Windsor Gardens
20 to Major to price?" And Channa was the employee that was
21 working for your wife at Major Energy, correct?

22 A. Correct.

23 MR. DAHAN: She said "wife at Major Energy"?

24 MS. PECTOR: I'm sorry. Thank you, Mr. Dahan.

25 Q. I meant at Meretz.

K35AHOR8ps

Benisti - Cross

1 A. Yeah.

2 Q. And the incoming message from her is, "No idea. I'll ask."

3 And your response is, "Don't send any Windsor stuff to
4 Major."

5 And she said, "OK. No problem."

6 Did I read that correctly, Mr. Benisti?

7 A. Yes. For that matter, Windsor actually signed directly
8 with Major Energy. So I appreciate your using that as -- isn't
9 that a great case there. She's taking him out of context.
10 Which is why, when I discuss things with my wife, I talk with
11 my wife and she takes it out of context to try to make it as if
12 I'm doing something bad over here. I just wanted the judge to
13 understand that. This is after a six-month deal with a very
14 high margin.

15 Q. Mr. Benisti, did you ever disclose to anybody -- well, let
16 me ask you, wouldn't you agree that there was a time period
17 when you were worried about Mr. Wiederman finding out about you
18 working for Meretz?

19 A. Possibly. I'm not sure.

20 Q. Just take a look. If we can go to page 77. And if we
21 could, on page 77, if we could start at the 7:26 entry and blow
22 up the next 15 lines. OK. Now, this is during the earnout
23 period, Mr. Benisti. Do you see we're at July 26, 2017?

24 A. Yes.

25 Q. And you're sending an outgoing message to your wife.

K35AHOR8ps

Benisti - Cross

1 You're saying, "I'm swamped here. Something fell through the
2 cracks and Mark noticed." She responds, "I'm so sorry. I'm
3 sure that's rough."

4 You respond "Ya, I haven't been so focused. It's no
5 good but I want Meretz to pick up. Mark totally saw my laptop
6 today."

7 Her response: "Oh, my God, you need to be more
8 careful. Did you comment? It shouldn't be out ever. You
9 should only use in the car."

10 And you respond, "I think he saw for sure. I'll make
11 a comment one day about it."

12 And she says -- she sends you a -- some type of meme.

13 THE COURT: Those are emojis.

14 MS. PECTOR: Emojis, I'm sorry.

15 I stand corrected by everybody in the courtroom.

16 Emojis. Thank you.

17 Q. Apologies for that, Mr. Benisti.

18 And you respond, "I know. It sucks."

19 So did that refresh your memory that you were worried
20 about Mark finding out that you were working for Meretz while
21 you were working for Major Energy?

22 A. If that's what's being -- I don't read full -- where's
23 that?

24 So, yes, I don't recall this even happened, but if
25 it's a message to my wife, I guess it happened. So, yes, there

K35AHOR8ps

Benisti - Cross

1 were times where, if it was just, you know, again, easier for
2 those few clients to be able to just see what the pricing is,
3 and we actually used this for our advantage a lot also. They
4 would call me and they would call me that had relationships
5 with Meretz Energy, very good relationships. I'm saying that
6 you just keep that relationship, it's a good relationship, we
7 can get pricing from other buyers, we know where other buyers
8 are at.

9 Q. Do you tell to Mr. Meretz and Mr. Leonard when you spoke to
10 him that I'm helping my wife with Meretz and actually Mark
11 Wiederman wants to buy into Meretz?

12 A. I, I don't think I was helping my wife with Meretz. It was
13 a deal. I was dealing with my deals, my direct clients, that I
14 didn't want to lose the relationship with because of the
15 pricing with Major Energy. Major's pricing had just gone
16 totally out of whack, where I didn't have a choice. It was --
17 at the end of the day we had clients that were turning to me
18 for competitive pricing. If I wasn't able to do that, then
19 Nicole would help me out.

20 Q. Mr. Benisti, during the earnout period, you had a Meretz
21 e-mail address, right?

22 A. Correct.

23 Q. During the earnout period you had a Meretz computer,
24 correct?

25 A. I don't think it was a Meretz computer. I know exactly

K35AHOR8ps

Benisti - Cross

1 what you're referring to. It was a tablet.

2 Q. OK. You had a tablet that you used to access your Meretz
3 e-mail on the Outlook at Major Energy, correct?

4 A. Yes.

5 Q. And you would --

6 A. Not -- I want to get it out there. I don't even recall the
7 incident, that incident happening. So I just want to let you
8 know that it was clearly not an often occurrence, but if I knew
9 that there was a deal that, you know, a customer wanted to
10 sign, I wanted to make sure that I was getting them.

11 Q. During the earnout period during working hours, you would
12 check your Meretz tablet while you were on Major Energy Wi-Fi,
13 correct?

14 A. I don't believe I used the Wi-Fi. I asked about it. I
15 don't believe I ever used the Wi-Fi.

16 Q. You do recall that Mark Wiederman saw you using your
17 computer to check Meretz' e-mail, during working hours,
18 correct?

19 A. Yeah. He may have seen a tablet on a desk or something.

20 Q. And do you remember having a conversation with
21 Mr. Wiederman about that during the earnout period?

22 A. I, I had a conversation with him about Meretz. I don't
23 remember if it was before this or after this.

24 Q. Let's look at --

25 THE COURT: How much longer do you think you have?

K35AHOR8ps

Benisti - Cross

1 It's getting pretty late.

2 MS. PECTOR: Yes.

3 THE WITNESS: I was supposed to travel to Canada
4 tonight. And I just want to understand, you're sitting here
5 drilling me. I think that -- also, let's set some context.

6 THE COURT: Hold on. Wait till the question. Your
7 lawyers will get a chance to do redirect. I know it's a weird
8 context, and that's how trials are, but you just have to try to
9 focus on the questions, and then your lawyers will be able to
10 give you another chance if they think it's appropriate.

11 MS. PECTOR: Your Honor, I'll tell you there is more
12 with this witness that's not cumulative. I apologize. I
13 didn't realize what the time of day is. And I do recognize
14 it's late. I don't know if you want this witness to come back
15 tomorrow and we'll finish up with him or how you'd like to --

16 THE COURT: Well, how much more do you think you have?

17 MR. DAHAN: Your Honor, we -- OK, how much more do you
18 have? You could answer that.

19 MS. PECTOR: Well, could I just have a one-minute
20 moment to look at my notes? Maybe 30 minutes. I could try and
21 be quick.

22 THE COURT: I don't think we can go that late. I
23 didn't even know the court reporters were going till 6. And
24 it's almost 6.

25 MR. DAHAN: Your Honor, we previewed with other

K35AHOR8ps

Benisti - Cross

1 counsel. And maybe we argued for five minutes or ten minutes
2 on the WhatsApp. So that I don't want to hear that as an
3 excuse. I previewed, how long are you going to have on cross
4 on this witness, so I could figure out time. We certainly had
5 other witnesses going today. So we could have even had
6 Mr. Gibson first in light of that. So, you know, this witness
7 is traveling, and for a party who is not party to this case,
8 having him come out twice, this -- you know, I had previewed in
9 advance around how long so we could factor this in. This
10 cross-examination has gone way beyond that previous testimony.
11 Now you're at another half hour on top of that.

12 THE COURT: Yes. I mean, I can give you another five
13 or ten minutes.

14 MS. PECTOR: OK.

15 THE COURT: So just focus on what you really need.

16 MS. PECTOR: OK. I'm just going to finish up and then
17 I'll do the rest.

18 James, would you pull up the bottom of 79, top of 80.
19 Q. Mr. Benisti, if you look at the last five lines of page 79
20 and the first five lines of page 80, do you see, here you are
21 on March 7, 2018, still during the earnout period. You say,
22 "I'm about to sit down with Mark." That's Mark Wiederman,
23 correct?

24 A. I believe so.

25 Q. And your wife said, "OK, great, so call me later." You

K35AHOR8ps

Benisti - Cross

1 say, "OK, will do." And you say, "He's for sure going to want
2 to speak about Meretz also, so in case I call, I start off with
3 Meretz, you know I'm with him."

4 And if we go on to the next page, you say, at 2:16
5 p.m., "Just had a long meeting with Mark. Went well, spoke
6 about a lot of stuff. He's dead serious about buying Meretz,
7 by the way, and he's serious about Monticello. LOL. Great.
8 Can I call you?"

9 Did I read that correctly, Mr. Benisti?

10 A. Yes.

11 Q. Does that refresh your memory that once Mr. Wiederman, who
12 was the president of Major Energy at the time, found out about
13 this, instead of disciplining you and telling you you shouldn't
14 be working for Meretz while working for Major Energy, he
15 actually said, "I want in and I want to buy Major Energy." Is
16 that right?

17 THE COURT: Meretz.

18 A. Again, just to put it in context, he and even, I believe, I
19 think he spoke to Nathan about this also. He wanted to have a
20 way of double -- of, you know, having the best price and having
21 that consistently competitive price at all times, having the
22 broker who could accomplish that. I, you know, yes, so that's
23 that. So if he want to buy it he had thought of it and he said
24 he was going to ask Nathan, and I believe Nathan said no.

25 Q. Mr. Benisti, let's just look briefly at DX 557, which

K35AHOR8ps

Benisti - Cross

1 Mr. Dahan went over with you.

2 A. That's who?

3 Q. PX 567.

4 This is a communication that Mr. Dahan went over with
5 you. Do you remember him asking you about Chris Martin sending
6 you an e-mail saying, "I'm glad you're going to continue with
7 Major because their" -- referring to Spark's process was time-
8 consuming and slow? Do you see that?

9 A. Yes.

10 Q. That broker continued to stay with you after the dropdown
11 with Spark, correct?

12 A. I believe -- when you say "continued," I'm not sure what
13 you mean "continued." Again, it's not like -- these brokers
14 don't cancel their agreement. So I believe he continued.

15 (Continued on next page)

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K357HOR9

Benisti - cross

1 BY MS. PECTOR:

2 Q. And you will agree, Mr. Benisti, that if Chris Martin knew
3 about Spark Energy's processes, it's because he was already a
4 broker for them, right?

5 A. As far as -- I would assume so, yeah.

6 Q. Let's go to PX750. PX750 is another document Mr. Dahan
7 went over with you from Mark Wiederman. And this was the one
8 where he was expressing frustration about not getting pricing
9 fast enough. Do you see that?

10 A. Yes.

11 Q. If you look at the date of this e-mail, this is August 10,
12 2016, and just to orient you, Mr. Benisti, the dropdown didn't
13 occur until August 23 of 2018 -- sorry. '16. So you will
14 agree with me just so you know during this time period do you
15 know that Major Energy had not yet been dropped down to Spark?

16 A. I mean I wasn't involved in the nitty gritty. All I know,
17 if I remember correctly, from the beginning I think once it was
18 out there, I believe people -- yeah, I am not sure what the
19 nitty gritty happened behind the scenes.

20 Q. Okay. At the top of this e-mail, Mr. Wiederman says "This
21 is a very large gas account that I have a very close personal
22 relationship with." And here is the important part, Mr.
23 Benisti. He says, "Due to PSE gas constraints, we have never
24 been able to get gas accounts from this client." Did I read
25 that correctly?

K357HOR9

Benisti - cross

1 A. Yes.

2 Q. Do you recall that prior to the dropdown to Spark there
3 were -- Major Energy did not have the ability in certain
4 markets to price gas accounts through PSE?

5 A. I think our pricing for gas wasn't as competitive as the
6 electric was. I think that's what he was trying to get at.

7 Q. Well, in fact PSE was not in certain gas markets; isn't
8 that right?

9 A. I don't know. I am not there.

10 Q. In any event, this customer that we see in this e-mail was
11 not a gas account customer that Major Energy had previously had
12 before the dropdown, correct?

13 A. Ask your question again. What's the question?

14 Q. This gas customer was not a customer that Major Energy had
15 previously had before the dropdown, correct?

16 A. I don't know if that's correct or not. I'm not sure.

17 Q. Mr. Benisti, do you recall that after Mark Wiederman was
18 terminated, you had concerns that he was going after Major
19 Energy's customers?

20 A. I possibly could have had concern.

21 Q. Do you remember specifically talking to Mr. Sobel about the
22 need to shut down access to the system because you thought Mark
23 Wiederman was going into the system?

24 A. I think I was doing the responsible thing that every
25 employee should have done, you know, and let them know, hey,

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Benisti - cross

1 these are log-ins that we had access to, change the passwords,
2 which is exactly what I did. I told them these are passwords
3 that were there, and we changed all those passwords.

4 Q. If I could briefly pull up page 70.

5 THE COURT: This is after the earnout.

6 MS. PECTOR: Yes, your Honor.

7 Q. Page 70, last three lines, this is April 3, 2019. Mr.
8 Benisti, that was just a few days after Mr. Wiederman was
9 terminated, right?

10 A. I believe so.

11 Q. And you send a message to David Sobel: "We need to change
12 the ConEd retail access user number and password. Mark is for
13 sure using that list of our customers and going after them."

14 Did I read that?

15 A. Yes. I also want to let you know that there was
16 probably -- there was a two or three month period that I was
17 frustrated at Mark. You know, I had suspected him of doing
18 something, which I had later found out that he did not do. So
19 I have no backing, or I didn't hear from anyone that Mark is
20 using these things, but this was -- like I again was invested
21 in the company, and I wanted to make sure that we were changing
22 passwords like what we should do, and that was all it is.
23 You're taking it out of context.

24 Q. Mr. Benisti, in the interest of time, the last question
25 that I have for you: Was there a point in time when Saul

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Benisti - cross

1 Horowitz asked you to set up a party for him and his family on
2 Major Energy's company credit card that you felt uncomfortable
3 with?

4 A. There was one time I think where we used this company for
5 like our holiday parties, so, yeah, we set up some sort of --
6 it was like a few platters or something.

7 Q. But in particular Saul Horowitz came to you and asked you
8 to use a Major Energy credit card to get food and other items
9 for him to host a party for his wife's family, correct?

10 A. I don't know who it was for or what, but again there was a
11 company we used, and I think I put an order -- I don't know if
12 I did -- I'm not sure exactly how it went down.

13 Q. Let us briefly pull up page 63 -- last question -- and if
14 we can just start with the two things above the redaction
15 image, the fifth entry, James, just blow it up. No, you have
16 to go where it says two things.

17 So just quickly, Mr. Benisti, the context of this is
18 "Two things." You're sending this message to David Sobel.
19 "One of them is really odd, but I'm just following orders from
20 Saul H." Is that Saul Horowitz?

21 A. I believe.

22 Q. And he said, "You can discuss with him, LOL, to call to
23 discuss with me first. The second thing is to become the
24 driving experience for David Gotlieb in LA."

25 Now if we can go to bottom of this image, Mr. James,

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Benisti - cross

1 and blow up the rest of that below.

2 Do you see at 10:42 you sent another message to David
3 Sobel that says: "Saul orders comes out to be in the 900 range
4 somehow. I sent him a pic asking if it's OK."

5 Sobel asked what he is ordering.

6 You respond: "His important party. He is hosting his
7 wife's family."

8 And David Sobel said: "In the house? Cheap ass."

9 You respond: "I just found it odd that he came to me.
10 Why didn't he go to Mark? He strange. Or straight to you. So
11 odd."

12 Did I read that correctly?

13 A. Yes.

14 Q. And so was that an example of Mr. Horowitz coming to you to
15 use Major Energy funds for a family party?

16 THE COURT: Were you going to point out the date?
17 March 2018.

18 MS. PECTOR: In the interests of time, we have no
19 further questions.

20 THE COURT: Thank you.

21 THE COURT: Did you want to move anything else into
22 evidence?

23 MS. PECTOR: Exhibit 1079?

24 THE COURT: Well, I think what I will do is, subject
25 to the objections, I will consider admission of the portions

K357HOR9

Benisti - cross

1 that you went through and exclude everything that you didn't?
2 Is that fair?

3 MS. PECTOR: Well, your Honor, the only item I would
4 just note for the record is to the extent we would have had
5 more time with this witness, there are other activities that
6 are going on during that period that were evidence of
7 interference.

8 THE COURT: We are where we are. Part of it is
9 mechanics of trial, but I'm going to have someone just remove
10 the parties that we didn't go over, so I am not even going to
11 look at them and consider the parts that we went through,
12 subject to any objection.

13 MR. MAROONEY: Or what they could just do is just make
14 a new exhibit with the parts they actually think are relevant,
15 right, and then we could deal with that. We will still have
16 objections to that because it's not a party, it's hearsay.

17 THE COURT: That's fine.

18 MS. PECTOR: We will be happy to do that.

19 THE COURT: OK. So 1079 will be admitted subject to a
20 revised version.

21 MS. PECTOR: Yes, your Honor. Thank you.

22 MR. DAHAN: I would keep my redirect under five
23 minutes.

24 THE COURT: And you have no other exhibits?

25 MS. PECTOR: I guess not, your Honor

K357HOR9

Benisti - redirect

1 REDIRECT EXAMINATION

2 BY MR. DAHAN:

3 Q. You were shown some WhatsApp message in August 2018, which
4 is four months, regarding setting up an ESCO that you were
5 thinking about. Did you open that ESCO?

6 A. No.

7 Q. OK. And that was about 30 months into the earnout?

8 A. Yes. Something like that.

9 Q. And, by the way, those messages happened at nighttime?

10 A. Yes.

11 Q. I think you were shown some messages about opening up a car
12 leasing business. Were you planning to sell energy from the
13 car leasing business?

14 A. I had planned to tell Sunil he should do this and have an
15 easier time to sell those contracts. I just thought it was an
16 idea, a good idea.

17 Q. And did that car leasing business take off?

18 A. No.

19 Q. Did it prevent you from doing your job?

20 A. No.

21 Q. In fact, I think you were shown earlier about how different
22 relationships you actually grew relationships in 2018.

23 A. Correct.

24 Q. And I think we went through an exhibit of certain examples
25 that showed that there was increase in some vendors between

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Benisti - redirect

1 brokers between '16 and '18. I think Ms. Pector showed you,
2 right?

3 A. Yes, I was committed and worked hard to get there.

4 Q. By the way, Bruce Shipper was on some of those messages
5 with respect to the ESCO, right?

6 A. Correct.

7 Q. Has he been fired?

8 A. No. He also has his own energy brokerage that Nathan knows
9 about. And Peter Whitney also has his own energy brokerage
10 that Nathan knows about and Chris knows about. My wife works
11 for an energy brokerage that I do not own and my wife does not
12 own.

13 Q. How many employees does Meretz have?

14 A. There is two employees: One half time and one full-time.

15 Q. Did you steer away \$12 million in revenue from Major Energy
16 to Meretz?

17 A. No.

18 Q. OK. Did you steer 110,000 customers from Major Energy to
19 Meretz?

20 A. No.

21 Q. In the morning -- sorry -- in the afternoon during your
22 direct you gave an explanation to the Court -- to the Judge --
23 about how the commercial brokerage business ran before and
24 after. Is there anything in your testimony that you believe
25 was inaccurate?

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Benisti - redirect

1 A. I don't think so.

2 Q. You talked about a couple examples that were shown to you
3 where your wife said -- or you told your wife don't bid that to
4 Major. Can you explain why you were telling your wife not to
5 propose a particular RFP to Major Energy?

6 A. Yes, because the way the RFP process works if there is two
7 people trying to bid one RFP, it gets blocked in the system.
8 They only allow one person to price each RFP. Since I was
9 currently the one in some of these cases where I was dealing
10 with the customer, I was pricing it directly with Major Energy.
11 Her sending it over would have done nothing, so it was simply
12 don't send it to Major.

13 Q. Were you actually trying to benefit Major Energy or harm
14 Major in that request?

15 A. It was a benefit. There is no point of sending it to them;
16 it's just nonsense, stupid. I was taking care of it.

17 Q. Were you trying to steer away that business from Major
18 Energy?

19 A. No.

20 Q. In one of your examples you actually said you closed that
21 account for Major Energy; is that correct?

22 A. Yes, in one case that she had mentioned, that account ended
23 up closing with Major Energy, directly with Major Energy, and I
24 also recall that there was a very high margin on that account.

25 MR. DAHAN: Nothing further, your Honor.

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Benisti - recross

1 THE COURT: Thank you. May I release this witness?

2 MR. DAHAN: Yes.

3 MS. PECTOR: Your Honor, just one brief redirect
4 question -- recross question.

5 RECROSS EXAMINATION

6 BY MS. PECTOR:

7 Q. Mr. Benisti, you came here today to testify voluntarily
8 because the sellers asked you to, correct?

9 A. Correct.

10 MS. PECTOR: No further questions.

11 A. Actually it wasn't the sellers. Mr. Dahan asked me. The
12 sellers did not ask me.

13 Q. To be clear, Mr. Benisti, you came here to testify
14 voluntarily because the sellers' counsel asked you to come and
15 testify about this case?

16 MR. DAHAN: I subpoenaed him.

17 MS. PECTOR: If a subpoena was issued, we never saw a
18 copy of it.

19 THE COURT: Was there a subpoena?

20 THE WITNESS: I got a subpoena.

21 THE COURT: All right. Thank you very much. You are
22 done. You are free. Happy anniversary and have a good trip.

23 OK, folks, I think tomorrow you said you were going
24 to do Mr. Alper and Mr. Chung, is that right?

25 MR. DAHAN: That's right.

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Benisti - recross

1 THE COURT: And then are you going to have witnesses?
2 Or no?

3 MR. BROWN: Plaintiff still has five witnesses.

4 MR. DAHAN: We are trying. We hope over the weekend,
5 your Honor -- unless we start cutting witnesses and they're
6 going to say they're calling the witness anyhow. Then
7 obviously -- but we are going to try to work over the weekend
8 to see, based on the evidence that came in, to see what we can
9 eliminate and get closer to our expert and let them put their
10 case on.

11 THE COURT: By the time we get to this Friday --

12 MR. DAHAN: No, through Friday. I meant through
13 tomorrow.

14 THE COURT: So can we get to a third witness tomorrow?

15 MR. DAHAN: So, given that we have to finish by 3
16 tomorrow, your Honor, if you recall, tomorrow, and what I'm
17 again being told as a projection for how long -- they're
18 starting cross -- so what I am being told as a projection for
19 their cross time plus my redirect time on the first witness
20 will be the longer witness. And the second witness is a direct
21 and cross.

22 THE COURT: So you think it will fill most of the day.

23 MR. BROWN: It could fill to 2 o'clock or 2:30. I
24 don't think it will go to three. And we discussed it.

25 THE COURT: So do you want to start? What time do you

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Benisti - recross

1 want to start?

2 MR. BROWN: I'm hoping to be under three hours with
3 Mr. Alper. He is the former CEO. And I do talk fast, so I am
4 hoping for 2:30.

5 MR. DAHAN: If your Honor wants to start at nine --

6 THE COURT: Let's go for 9:15. Thanks everybody.
7 Have a good night.

8 (Adjourned to March 6, 2020 at 9:15 a.m.)
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PLAINTIFF EXHIBITS

Exhibit No.	Received
253	783
656, 374, 380, 376, 680, and 361	845
414, 359, 567, 750, and 758	889

DEFENDANT EXHIBITS

Exhibit No.	Received
302, 213, and 359	783
180 and 494G	830
263 and 995	851
414	889